TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 587

SAMUEL R. TOUCEY, PETITIONER,

vs.

NEW YORK LIFE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 20, 1940.

CERTIORARI GRANTED JANUARY 6, 1941.

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 11,686

CIVIL.

SAMUEL R. TOUCEY, APPELLANT,

vs.

NEW YORK LIFE INSURANCE COMPANY, A CORPORATION, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

FILED FEBRUARY 7, 1940.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 6, 1941.

[fol. 1] United States of America—Set.:

Be it remembered that heretofore, to-wit, at the regular November term of the United States District Court for the Western Division of the Western District of Missouri, and on the 5th day of February, 1936, there was filed in the office of the clerk of said court a Transcript on Removal from the Circuit Court of Jackson County, Missouri, in the cause wherein Samuel R. Toucey is Plaintiff and New York Life Insurance Company, a corporation, is Defendant.

The Petition, Petition for Removal, Removal Bond, Notice of filing Petition and Bond, Order of Removal and Certificate of the Clerk contained in said Transcript, captions omitted, are as follows:

(Petition)

I.

Comes plaintiff in the above entitled cause and for his cause of action herein states that the defendant is a mutual life insurance company organized and existing under the laws of the state of New York and authorized to do business in the state of Missouri, with a branch office of said company located in Kansas City, Jackson County, Missouri, and as such mutual life insurance company the defendant is authorized and empowered to write insurance policies upon the lives of individuals, providing for the payment of certain sums upon their death or disability, and as such said defendant is liable to suit in the courts of this state.

II.

Plaintiff further states that on the 2nd day of January, 1924, the defendant issued its life insurance policy = 8 611

895 on the life of plaintiff herein by which it agreed to pay [fol. 2] plaintiff's beneficiary a death benefit of Fifty Thousand Dollars ($50,000.00) and the sum of Five Hundred Dollars ($500.00) each month during the lifetime of the plaintiff, and also to waive the payment of premiums on said policy if said plaintiff became wholly and presumably permanently disabled before the age of sixty years by bodily injury or disease, so that he would be thereby prevented from engaging in any occupation for remuneration or profit in case such disability occurred after said policy took effect and before the anniversary at which plaintiff's age at the latest birthday was sixty years; that plaintiff upon delivery of said policy paid a premium of Two Thousand, One Hundred Eighty-two Dollars ($2,182.00) in advance and paid all premiums on said policy until the quarterly premium due on October 2, 1934, which was not paid for the reasons hereinafter set out.

III.

Plaintiff further states that on or about the 1st of July, 1934, and while the aforesaid policy of insurance was in full force and effect, plaintiff had other life insurance with the defendant company, being policies #10 226 440, #10 391 096 and #10 533 974, which, together with the above policy #8 611 895 for the sum of Fifty Thousand Dollars ($50,000.00), provided for One Hundred Thousand Dollars ($100,000.00) death benefits; that on or about the 1st of July, 1934, plaintiff consulted the Treasurer and other agents and employees of the branch office of the New York Life Insurance Company in Kansas City, Missouri, about his life insurance policies with said company, informing said officers and employees at that time that he was totally disabled and had been since April, 1933, because of an operation for stomach ulcers; that he could not work and on that account could not pay the premiums on all the aforesaid life insurance policies, and asked said officers and employees of the defendant company to analyze said policies and advise him as to the coverage of all of his policies with [fol. 3] said company, and what values existed in said policies at that time; that the officers, employees and agents of said Kansas City branch office of the defendant company, although being theretofore advised as to plaintiff's physical condition, fraudulently advised plaintiff that if he

would surrender the three policies numbered 10 226 440, 10 391 096, and 10 533 974, and reduce the death benefits of his policy #8 611 895 from Fifty Thousand Dollars ($50,000.00) to Twenty-five Thousand Dollars ($25,000.00), with a corresponding reduction in the premium and monthly payment of disability benefits from Five Hundred Dollars ($500.00) per month to Two Hundred Fifty Dollars ($250.00) per month, he would receive approximately Eleven Hundred Fifty Dollars ($1150.00) in cash, and that there would be sufficient values left in said policy #8 611 895 as so reduced to carry such reduced policy until the 2nd of January, 1935.

IV.

Plaintiff further states that after being advised as aforesaid by the officers, employees and agents of the branch office of the defendant company at Kansas City, Missouri, that he would receive approximately Eleven Hundred Fifty Dollars ($1150.00) upon the cancellation of said three numbered policies aforesaid, and the reduction of policy #8 611 895, as aforesaid, on the ..... day of August, 1934, he received notice from said branch office of the defendant company in Kansas City that a mistake had been made in computing his benefits under all of said policies; that instead of the company owing him about Eleven Hundred Fifty Dollars ($1150.00), he would owe the company Two Hundred Thirty-four Dollars ($234.00), and not knowing his rights in the premises, and not knowing whether this advice was correct or not, he paid under protest the quarterly payment due on the 2nd of July, 1934, on said policy #8 611 895. That plaintiff, realizing and believing that he could not rely upon information received from the branch office of the New York Life Insurance Company wrote the [fol. 4] home office of the defendant company in the City of New York, on August 11, 1934, notifying and advising said home office that he had spent several months trying to find out just what his policies were worth, and had found that the advice given him by the Kansas City office was wrong, and that he desired of the home office that a complete analysis of his four policies be made for coverage and values and that he be advised his exact status and rights under said insurance. He also notified said company at the same time in writing, while said policy #8 611 895 was

in full force and effect, that he was totally disabled and could not work; that his income had ceased and if his insurance was cancelled he could not secure other insurance because of his physical condition; that he had been operated on in April, 1933, for stomach ulcers. That, although this defendant was so notified, said defendant fraudulently failed to advise this plaintiff that if he was totally disabled by disease, his policy provided for certain disability benefits because of such disease, defendant knowing and being advised in writing that plaintiff did not know his rights under said policy and the coverage thereof, and was asking defendant company for advice as to the coverage of said policy, and the defendant knowing that plaintiff was ignorant of his rights under said policy, and knowing that plaintiff was totally disabled and had been since April, 1933, and defendant knowing that plaintiff was unable to work and could not pay the premiums on his insurance policies, and knowing that the plaintiff had been wrongfully advised as to his rights under his policies by the officers and agents of said defendant company's branch office in Kansas City, Missouri, and knowing that at the time said policy #8 611 895 was issued to plaintiff, in the year 1924, plaintiff was then of the age of forty-five years, and knowing that plaintiff was of the age of fifty-five years at the time it received notice of his total disability, it fraudulently and intentionally failed to advise the plain-[fol. 5] tiff of his rights under said policy #8 611 895, and fraudulently induced the plaintiff to reduce said insurance from a principal sum of Fifty Thousand Dollars ($50,000.00) to Twenty-five Thousand Dollars ($25,000.00), and fraudulently reduced the disability benefits thereof from Five Hundred Dollars ($500.00) per month to Two Hundred Fifty Dollars ($250.00) per month, and that because of said actions by defendant and its fraudulent failure and refusal to advise plaintiff of his rights under said policy, plaintiff was led by the conduct and actions and silence of the defendant, as aforesaid, to make said reductions in said policy, as aforesaid, and because of said facts as herein alleged, plaintiff acted to his irreparable injury and defendant is now estopped to claim or assert that due proof was not made on August 11, 1934, of total and permanent disability as provided by the terms of said policy.

V.

Plaintiff further states that at the time said defendant company attempted to reduce said policy, said defendant knew, by written notice dated June 29, 1934, that plaintiff was totally and permanently disabled, and knew that the contingent rights of plaintiff to disability benefits and waiver of premiums under the terms of said policy had then become fixed liabilities of the defendant company, and well knew that the plaintiff was ignorant of his rights under said policy, fraudulently reduced same, as aforesaid, without any consideration whatever for said reduction, and that said reduction of said policy both as to death and disability benefits was wholly without consideration and fraudulent and void as aforesaid.

VI.

Plaintiff further states that in September, 1935, and a few days after being advised by a medical examiner that his policy covered disability benefits for disease, plaintiff made oral demand upon the defendant company at its [fol. 6] branch office in Kansas City for the payment of disability benefits, and the reinstatement of his policy #8 611·895, which defendant had unlawfully cancelled because of the alleged failure to pay the premium due on October 2, 1934, thereon, but that defendant failed and refused on September 26, 1935, to reinstate said policy so unlawfully cancelled and to pay any disability benefits thereunder, for the reason stated in its written notice to the Kansas City branch office of the New York Life Insurance Company that due proof had not been given within six months after the cancellation of such policy, although this defendant well knew that in June and August, 1934, and while said policy was in full force and effect, it had received written notice of the total disability of plaintiff by disease, and his inability to pay premiums on said policies, and defendant well knowing that plaintiff was then under the age of sixty years, and that said disability benefits had continued for more than three months, and well knowing that said policy provided for the waiver of premiums and the payment of monthly benefits so long as said total disability should continue, and well knowing that the plaintiff did not know of his rights under said policy, and well knowing

that plaintiff had asked for an analysis of his policies of the defendant company at its home office in New York City, knowingly and fraudulently and intentionally failed and refused to advise plaintiff as to his rights, and failed and refused to advise him that said policy would be kept in force by the waiver of premiums if he was totally disabled, and misled the plaintiff to his irreparable injury, and unlawfully and fraudulently cancelled said policy #8 611 895, although plaintiff has paid defendant in premiums on said policy approximately Twenty-two Thousand Dollars ($22,000.00).

VII.

Plaintiff further states that he faithfully and fully performed all the terms and conditions of said policy, and that he was wholly and presumably permanently disabled [fol. 7] before reaching the age of sixty years and has been since April, 1933, when he was fifty-four years of age, and that he was so totally and wholly disabled by disease so that he is prevented thereby from engaging in any occupation whatsoever for remuneration or profit, and that he was so totally disabled for more than three consecutive months immediately before August 11, 1934, when he gave the defendant company at its home office in the City of New York notice of such total and permanent disability by disease, and that he is still totally and permanently disabled, and that said policy #8 611 895 was in full force and effect when his disability as aforesaid was incurred, and that he was so disabled as aforesaid on August 11, 1934, while said policy was in full force and effect and before any default in the payment of the October, 1934, premium thereon; that although defendant knew of said disability and that plaintiff was wholly disabled by disease, as aforesaid, on and for many months before August 11, 1934, and knowing that plaintiff at the time of his disability was under the age of sixty years, and knowing that said policy, at the time defendant received written notice at its home office in New York of such disability, was in full force and effect, and knowing that plaintiff was asking the officials, officers and agents of the defendant company at its home office in New York to advise him as to the coverage of said policy and his rights thereunder, that said defendant fraudulently and wilfully failed and refused to advise the plaintiff, although

it was its duty so to do, but on the contrary led plaintiff to believe that his only rights under said policy were to either pay the premiums thereon or to carry the same as long as it could be carried as extended insurance, and thereby misled the plaintiff, to his irreparable damage.

Plaintiff further states that because of the foregoing, he is entitled under the facts herein alleged to have the attempted reduction of his policy #8 611 895 set aside and for naught held, and to have the attempted cancellation of [fol. 8] said policy adjudged to be of no force and effect, and that he is entitled to recover of defendant disability benefits under said policy as provided for therein from August 11, 1934, and for the waiver of premiums on said policy so long as plaintiff is totally and permanently disabled because of disease.

VIII.

Wherefore, plaintiff prays that said policy #8 611 895 of the defendant company be adjudged to be in full force and effect, and that said policy be reinstated and that the attempted reduction thereof as of July 2, 1934, be declared to be null and void, and that the premiums thereon be declared waived by the defendant company because of the total and permanent disability of the plaintiff for such time that such disability shall continue, and further prays for the recovery of the sum of Five Hundred Dollars ($500.00) for disability benefits per month from August 11, 1934, and for return of the said premium paid for the quarter beginning July 2, 1934, and for interest on each of these sums at the rate of six per cent. (6%) per annum, and plaintiff prays for such other and further relief as to the court seems meet and equitable and for the costs of this suit.

CHAS. M. HOWELL,
CHAS. M. HOWELL, JR.
WM. H. ALLEN,
SCOTT R. TIMMONS,
Attorneys for Plaintiff.

Filed in the Circuit Court of Jackson County, Mo., Oct. 26, 1935.

(Petition for Removal of Cause to Federal Court.)

To the Honorable, the Circuit Court of Jackson County, Missouri:

Your petitioner, New York Life Insurance Company, respectfully shows that it is the only defendant in the above entitled cause, and that the matter in dispute in said cause exceeds, exclusive of interest and costs, the sum or [fol. 9] value of Three Thousand ($3,000.00) Dollars.

Your petitioner further shows that said suit is of a civil nature, being an action brought by plaintiff against your petitioner in and by which plaintiff seeks to compel your petitioner to reinstate a certain policy of life insurance, being New York Life Insurance Company Policy No. 8,611,895, which had been originally issued in the face amount of Fifty Thousand ($50,000.00) Dollars but which had by agreement of the parties been reduced to the face amount of Twenty-five Thousand ($25,000.00) Dollars and which had later been cancelled by your petitioner because of the failure of the plaintiff to pay the premiums thereon, and plaintiff seeks to have said policy reinstated; that said suit also seeks to compel your petitioner to waive the payment of premiums on said policy and to compel your petitioner to pay to plaintiff the sum of Five Hundred ($500.00) Dollars per [months] as disability benefits from August 11, 1934, and to return to plaintiff a premium paid on July 2, 1934, with interest on all of said sums at the rate of six per centum per annum; it being alleged that plaintiff is entitled to said disability benefits and the waiver of said premiums by virtue of the terms of the disability benefit provisions of said policy, alleging that plaintiff is and has been since April, 1933, totally and permanently disabled within the terms and meaning of said policy; and said suit further asks for such other and further relief as to the Court seems meet and equitable.

Your petitioner further shows that said suit involves a controversy wholly between citizens of different states, to-wit: between plaintiff, who is now and was at the time of the commencement of this suit, a citizen and resident of the State of Missouri, and your petitioner, who is now and was at the time of the commencement of this suit a citizen

and resident of the State of New York, being a corporation duly created and existing by authority of the laws of the State of New York, and a non-resident of the State of [fol. 10] Missouri, and that this controversy can be wholly determined between plaintiff and your petitioner.

And your petitioner offers herein a bond with good and sufficient surety in the penal sum of Two Hundred Fifty ($250.00) Dollars, conditioned for its entering in the District Court of the United States for the Western Division of the Western District of Missouri, within thirty days from the date of filing this petition and the said bond for removal, a copy of the record in this suit and for the payment of all costs which may be awarded by said District Court of the United States if said District Court of the United States should hold that this suit was wrongfully or improperly removed thereto.

Your petitioner therefore prays this Honorable Court to proceed no further herein except to make an order of removal as required by law, and to accept said surety and bond and to cause the record here in to be removed into said District Court of the United States within and for the Western Division of the Western District of Missouri, according to the statutes in such cases made and provided.

And your petitioner will ever pray, etc.

NEW YORK LIFE INSURANCE COMPANY, Petitioner,
By Lathrop, Crane, Reynolds, Sawyer & Mersereau,
Attorneys for Petitioner.

State of Missouri,
County of Jackson—ss.:

Richard S. Righter, of lawful age, being duly sworn, on his oath says that he is an attorney and an agent of and for New York Life Insurance Company, the maker of the above and foregoing petition for removal, and well knows the contents thereof, and that the statements and allegations therein made and contained are true.

RICHARD S. RIGHTER.

Subscribed and sworn to before me this 11th day of January, 1936.

(Seal) LOTTIE L. VOGEL,
Notary Public within and for
[fol. 11] Jackson County, Missouri.

My commission expires: May 11-1936.

Filed in the Circuit Court of Jackson County, Mo., Jan. 13, 1936.

(Removal Bond)

Know All Men By These Presents:

That we, New York Life Insurance Company, as principal, and National Surety Corporation, as surety, are held and firmly bound unto Samuel R. Toucey, and all other persons whom it may concern, in the penal sum of Two Hundred Fifty ($250.00) Dollars lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Whereas, New York Life Insurance Company, the principal above named, has petitioned the Circuit Court of Jackson County, Missouri for the removal of a certain suit therein pending, wherein said Samuel R. Toucey is plaintiff and said New York Life Insurance Company is defendant, into the District Court of the United States for the Western Division of the Western District of Missouri;

Now, Therefore, the condition of this obligation is such that if the above bounden, New York Life Insurance Company, shall, within thirty days from the date of filing the petition and this bond for the removal of this cause to said District Court of the United States, enter in said District Court of the United States a copy of the record in this suit, and shall pay all costs that may be awarded by said District Court of the United States, if said District Court of the United States shall hold that this suit was wrongfully or improperly removed thereto, and shall also appear in said District Court of the United [Statea] [fol. 12] and enter special bail in said cause if special bail was originally required therein, and shall do such other appropriate acts as by the Act of Congress in that behalf

are required to be done upon the removal of said suit from the State Court into the United States Court, then this obligation shall be void; otherwise of force.

Witness our hands and seals this 11th day of January, 1936.

NEW YORK LIFE INSURANCE COMPANY, (Seal)
By Lathrop, Crane, Reynolds, Sawyer & Mersereau,
Its Attorneys-in-fact.

NATIONAL SURETY CORPORATION, (Seal)
By F. A. Brinkman,
Its Attorney-in-fact.

Filed in the Circuit Court of Jackson County, Mo., Jan. 13, 1936.

(Notice of Filing Petition and Bond for Removal.)

To the Plaintiff in the above entitled cause:

You are hereby notified that the defendant in the above entitled cause will, on the first day of the January Term, 1936 of the above named Court, file in the above entitled cause in said court a petition and bond for the removal of said cause from said court to the District Court of the United States for the Western Division of the Western District of Missouri, copies of which petition and bond are herewith delivered to you.

LATHROP, CRANE, REYNOLDS, SAWYER & MERSEREAU,
Attorneys for Defendant.

Service of the above notice and receipt of copies of the petition and bond for removal therein mentioned are hereby acknowledged this 13th day of January, 1936.

CHAS. M. HOWELL,
SCOTT R. TIMMONS,
CHAS. M. HOWELL, JR.,
Attorneys for Plaintiff.

[fol. 13]

Filed in the Circuit Court of Jackson County, Mo., Jan. 13, 1936.

(Order of Removal.)

January 23, 1936.

Now on this day this cause coming on for hearing upon the petition of the defendant for the removal of this cause to the District Court of the United States, and it appearing to the Court that the defendant has filed its petition for such removal in due form of law and has heretofore filed its bond for removal, which said bond is by the Court approved and petition granted.

It is thereupon ordered by the Court that this cause be and the same is hereby removed from this Court within and to the District Court of the United States, in and for the Western Division of the Western District of Missouri, at Kansas City.

(Clerk's Certificate to Transcript from State Court.)

State of Missouri,
County of Jackson—ss.:

I, John D. Burns, Clerk of the Circuit Court within and for the County and State aforesaid, do hereby certify that the above and foregoing is a true, full and complete copy of the record and filings in the above entitled cause as the same appear of record and on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Kansas City, Missouri, this 3rd day of February, 1936.

(Seal)

JOHN D. BURNS, Clerk.
By M. Shaughnessy, D. C.

[fol. 14] (Application of New York Life Insurance Company for Leave to File Supplemental Bill in Equity.)

Now comes New York Life Insurance Company and prays the Court to make an order granting it leave forthwith to file its supplemental bill in equity herein.

GEORGE J. MERSEREAU,
RICHARD S. RIGHTER,
HORACE F. BLACKWELL, JR.,
Solicitors for Defendant New York Life Insurance Company.

Filed in the United States District Court, Mch. 10, 1938.

(Order Granting New York Life Insurance Company Leave to File Supplemental Bill in Equity.)

For good cause shown leave is hereby granted to New York Life Insurance Company forthwith to file herein its supplemental bill in equity.

Dated at Kansas City, Missouri this 10th day of March, 1938.

MERRILL E. OTIS, Judge.

Filed in the United States District Court, Mch. 10, 1938.

[fol. 15] Supplemental Bill In Equity of New York Life Insurance Company.

In the District Court of the United States For the Western Division of the Western District of Missouri.

November Term, 1937.

Samuel R. Toucey, Plaintiff,
No. 2810. vs. In Equity.
New York Life Insurance Company, a corporation, Defendant.

Now comes New York Life Insurance Company, a corporation, and for its supplemental bill in equity herein and for its cause of action against plaintiff states:

1. That on or about the 26th day of October, 1935, plaintiff Samuel R. Toucey commenced this action in equity

against this defendant in the Circuit Court of Jackson County, Missouri wherein said Toucey alleged and claimed that he was the assured in New York Life Insurance Company's policy No. 8611895 in the face amount of Fifty Thousand Dollars ($50,000.00), in which the insurer also agreed to pay the sum of Five Hundred Dollars ($500.00) per month during the lifetime of said Toucey and to waive the payment of premiums if said Toucey became wholly and presumably permanently disabled by bodily injury or disease before age sixty, as in said policy defined and limited; that said petition further states that said Toucey paid the premiums on said policy until October 2, 1934; that the quarterly premium due on that day was not paid; said petition further states that about July 1, 1934 said Toucey informed various officers and employees of New York Life Insurance Company at its Kansas City branch office that he was totally disabled and had been so disabled since April, 1933 because of an operation for [fol. 16] stomach ulcers, and that said Toucey could not work on that account, and asked said officers and employees to examine said policy and other policies belonging to said Toucey and advise him as to the coverage under said policies and what value existed in said policies at that time; that said petition further alleged that said officers and agents of said Kansas City branch office fraudulently advised said Toucey that if he would surrender three other policies held by him in New York Life Insurance Company and reduce the death benefits under said policy No. 8611895 from Fifty Thousand Dollars ($50,000.00) to Twenty-five Thousand Dollars ($25,000.00) with a corresponding reduction of the monthly disability benefits from Five Hundred Dollars ($500.00) to Two Hundred Fifty Dollars ($250.00) per month he would receive approximately Eleven Hundred Fifty Dollars ($1150.00) in cash and that there would be sufficient values left in said policy No. 8611895, if so reduced, to carry said reduced policy until the 2nd of January, 1935; that said petition further alleged that thereafter and on the ..... day of August, 1934 said Toucey was notified by said branch office that a mistake had been made in computing his benefits under said policies and that instead of the New York Life Insurance Company owing Toucey Eleven Hundred Fifty Dollars ($1150.00) Toucey would owe said company Two Hun-

dred Thirty-four Dollars ($234.00), and that not knowing his rights in the premises or whether said advice was correct, said Toucey paid under protest the quarterly premium due July 2, 1934 on said policy No. 8611895. Said petition further alleged that said Toucey on August 11, 1934 notified said company that he was totally disabled and could not work and that although so notified said company fraudulently failed to advise him that if he was totally disabled by disease his policy provided for certain [fol. 17] disability benefits because of such disease, said Toucey being then ignorant of his rights under said policy; that said company's failure to advise said Toucey of his rights was fraudulent and intentional and that Toucey was led by said conduct and silence of said company to make the said reduction in said policy and that said company was thereby estopped to claim or assert that due proof was not made on August 11, 1934 of total and permanent disability as provided by the terms of said policy; that said petition further stated that said Toucey became totally disabled in April, 1933 and has since been so disabled so that he is prevented thereby from engaging in any occupation whatsoever for remuneration or profit and was so disabled for more than three consecutive months before August 11, 1934 and was ~~still~~ so totally disabled at the time of the filing of said petition. Said petition prays that said policy be adjudged to be in full force and effect and that it be reinstated and that the attempted reduction thereof as of July 2, 1934 be declared null and void and that the premiums thereon be declared waived because of the total and permanent disability of the plaintiff, and for the recovery of Five Hundred Dollars ($500.00) per month in disability benefits from August 11, 1934, with interest and for such other and further relief as the Court deemed meet and equitable and for costs. A copy of said petition, marked Exhibit "A", is attached hereto and by reference made a part hereof.

2. Defendant further states that summons was duly issued pursuant to the filing of said petition and was duly served on New York Life Insurance Company, returnable the second Monday in January, 1936. That on said date New York Life Insurance Company duly filed in the Circuit Court of Jackson County, Missouri a petition to re-

move said cause to the United States District Court for [fol. 18] the Western District of Missouri; that an order removing said case to said court was duly made pursuant to said petition, a sufficient removal bond having been filed at the same time; that thereafter a good and sufficient removal transcript was duly prepared by the Clerk of said Circuit Court and was in proper time duly filed in said United States District Court and said cause was docketed in equity in said Court and numbered 2810; that thereafter New York Life Insurance Company filed on February 21, 1936, a motion to dismiss said cause on the ground that plaintiff's petition therein did not state facts sufficient to constitute a cause of action against defendant and did not state facts sufficient to entitle the plaintiff herein, Samuel R. Toucey, to the relief prayed for in said petition; that said motion was overruled by the Court on the 13th day of March, 1936; that thereafter and on April 23, 1936 New York Life Insurance Company, defendant in this cause, duly filed its answer and motion to dismiss said cause, a copy of which, marked Exhibit "B", is hereto attached and by reference made a part hereof; that by said answer New York Life Insurance Company denied that plaintiff paid all premiums on said policy until the quarterly premium due October 2, 1934, but admitted that the premium due that day was not paid; it admitted that said policy No. 8611895 was in force on July 1, 1934; it requested strict proof of the allegation that said Toucey stated to the officers and employees of the Kansas City branch office that he was totally disabled and had been so disabled since April, 1933, and requested strict proof that said Toucey requested said employees to analyze his policies and advise him of the coverage and what values existed therein at said time. Said answer denied that any of defendant's Kansas City branch office employees advised [fol. 19] Toucey fraudulently or advised him in the manner or to the effect stated in said petition; said answer stated that none of the employees of said branch office was an officer of defendant and none was authorized by defendant to advise policyholders on its behalf. The answer denied that defendant had received any letter from plaintiff written on August 11, 1934 and denied that it fraudulently failed to advise plaintiff of his rights or fraudulently induced plaintiff to reduce his insurance; it denied that defendant

was under any obligation to advise plaintiff with respect to the meaning or the legal effect of his policies or that it did so advise him. Said answer denied that plaintiff was wholly and permanently disabled since April, 1933 and denied that he was so totally disabled by disease that he was prevented thereby from engaging in any occupation whatsoever for remuneration or profit or that he was totally disabled for more than three consecutive months immediately before August 11, 1934, or that he gave defendant notice at its home office of such alleged total and permanent disability and denied that plaintiff was at the time said answer was filed still totally and permanently disabled. Said answer further stated that on July 31, 1934, plaintiff made written application to defendant New York Life Insurance Company for the reduction of its policy No. 8611895 from a face amount of Fifty Thousand Dollars ($50,000.00) to a face amount of Twenty-five Thousand Dollars ($25,000.00), with a corresponding reduction in all the other benefits thereunder; that said plaintiff Toucey further applied for the cash surrender value of certain other New York Life Insurance Company policies at about the same time and that said defendant paid him on August 7, 1934, the sum of Seven Hundred Seventeen and 31/100 [fol. 20] Dollars ($717.31), being the full cash surrender value of policy No. 10226440 and the sum of Four Hundred Thirty-six and 11/100 Dollars ($436.11), being the full cash surrender value of policy No. 10391096; that plaintiff Toucey accepted said sums and on September 26, 1934, said policy No. 8611895 was reduced as aforesaid; that thereafter and on October 2, 1934, a quarterly premium in the amount of Two Hundred Eighty-nine and 25/100 Dollars ($289.25) became due upon said policy No. 8611895; that on November 2, 1934, the last day of grace in which by the terms of said policy plaintiff was entitled to pay the premium thereon falling due on said October 2nd, plaintiff Toucey delivered to defendant his check for Two Hundred Eighty-nine and 25/100 Dollars ($289.25) which was deposited by defendant in the bank and was thereafter returned to defendant by the bank not honored, and that thereupon said policy lapsed for failure to pay said premium due October 2, 1934; that on November 21, 1934 de-

fendant sent said Toucey a letter enclosing said check and notified said Toucey that because said check had been returned by said bank not honored said policy had lapsed on the books of the company; that plaintiff never paid said premium and never reinstated said policy; that thereafter and on April 3, 1935, defendant New York Life Insurance Company at the request of the plaintiff Toucey paid him the sum of One Hundred Three and 46/100 Dollars ($103.46), being the cash surrender value of its policy No. 10533974. Defendant states that said answer reads in part as follows:

"9. Defendant further states that said policy No. 8611895 provides in part:

'And the Company Agrees to Pay to the Insured Five Hundred Dollars each month ($10 Per $1,000 of the face of this policy) during the lifetime of the Insured, and also to [fol. 21] waive the payment of premiums, if the Insured becomes wholly and presumably permanently disabled before age 60, subject to all the terms and conditions contained in Section 1 hereof.';

that Section 1 of said policy provides:

'Disability Benefits

1. Total Disability.—Disability shall be deemed to be total whenever the Insured is wholly disabled by bodily injury or disease so that he is prevented thereby from engaging in any occupation whatsoever for remuneration or profit.

2. Permanent Disability.—Disability shall be presumed to be permanent,—(a) Whenever the Insured will presumably be so totally disabled for life; or—(b) After the Insured has been so totally disabled for not less than three consecutive months immediately preceding receipt of proof thereof.

3. Benefits.—Upon receipt at the Company's Home Office, before default in payment of premium, of due proof that the Insured is totally and presumably permanently disabled and that such disability occurred after the insurance under this Policy took effect and before its anniversary on which the Insured's age at nearest birthday is sixty years, the following benefits will be granted:

(a) Income Payments.—The Company will pay to the Insured a monthly income of $10 per $1,000 of the face of the policy during his lifetime and continued disability, beginning immediately on receipt of said proof. Any income payment due before the Company approves the proof of disability shall be payable upon such approval. If disability results from insanity, income payments under this section will be paid to the beneficiary in lieu of the Insured.

(b) Waiver of Premiums—The Company will waive payment of any premium falling due after approval of said proof and during such disability. Any premium due prior to such approval is payable in accordance with the terms of the policy, but if due after receipt of proof will, if paid, be refunded upon approval of proof.

4. In the event of default in payment of premium after the Insured has become totally disabled, the policy will be [fol. 22] restored upon payment of arrears of premium with interest at 5%, provided due proof that the Insured is totally and presumably permanently disabled, as herein defined, is received by the Company not later than six months after said default and the benefits under this section shall then be the same as if said default had not occurred.

5. It is further agreed that the total and irrecoverable loss of the sight of both eyes, or of the use of both hands or of both feet or of one hand and one foot shall be considered total and permanent disability.

6. Recovery from Disability.—The Company may from time to time demand due proof of the continuance of total disability, but not oftener than once a year after it has continued for two full years. Upon failure to furnish such proof, or if at any time it shall appear to the Company that the Insured is able to engage in any occupation for remuneration or profit, no further income payments shall be made nor premiums waived.

7. The sum payable in any settlement of the policy shall not be reduced by income payments made more by premiums waived under the above provisions. Dividends, loan and surrender values shall be the same as if the waived premiums had been duly paid. If any benefit under this

section is unpaid at the time of the Insured's death it shall be payable to the person entitled to the proceeds of the policy.

'8. These Disability Benefits will not apply if the disability of the Insured shall result from self-inflicted injury or from military or naval service in time of war.'

Defendant further states that by the aforesaid endorsement the amount of said monthly disability benefits was duly reduced to the sum of Two Hundred Fifty Dollars ($250.00) per month; that defendant never at any time while said policy was in force received from plaintiff any claim that plaintiff was entitled to disability benefits under said policy and never received from plaintiff at its home office before default in payment of premium due proof that [fol. 23] the insured was totally and presumably permanently disabled, and that such disability occurred after the insurance under this policy took effect and before its anniversary on which the insured's age at nearest birthday was 60 years; that plaintiff is not entitled to any of the relief prayed for in plaintiff's petition, and is not entitled to any disability benefits or any benefits whatever of any kind or character under said policy.

Wherefore, having fully answered plaintiff's petition, defendant prays that this suit be dismissed with prejudice and that defendant have its costs herein incurred and expended."

3. Defendant further states that thereafter and on or about the 25th day of May, 1936 Samuel R. Toucey filed his reply to defendant's answer in said equity cause No. 2810 and therein averred that said Toucey requested a complete analysis of his policies from L. C. Schellhorn, Cashier of the Kansas City branch office of the New York Life Insurance Company, and from M. M. McKenny and a Mr. Wells of said branch office and advised them of his total and permanent disability as alleged in his petition; that defendant company held out to plaintiff that said Cashier and said officers and agents had the authority to analyze insurance policies for coverage and give advice to policyholders thereon and receive communications oral and written from policyholders as to the physical condition and disability of such policyholders and that plaintiff Toucey

dealt with said persons with the understanding and belief that they had such authority and defendant was estopped by holding said persons out as having such authority to [fol. 24] assert that they do not have it. Said reply averred that plaintiff did furnish due proof of his total and permanent disability to defendant by two letters, one dated June 29, 1934 and one dated August 11, 1934, as alleged in his petition and that said letters constituted such due proof; that his oral statements to the said agents and employees of the Kansas City branch office advising them of his total and permanent disability existing prior to 1934 constituted such due proof and that defendant failed upon receipt of such due proof to request any further or additional proof of such disability; that defendant was estopped by failing to ask further proof of disability to assert that such due proof was not made. A copy of said reply is hereto attached, marked Exhibit "C", and by reference is made a part hereof.

4. Defendant states that thereafter the aforesaid cause came on for trial on the 18th day of November, 1936 before the Honorable Merrill E. Otis, District Judge, and that thereafter said trial was concluded on November 22, 1936 and on said day the Court rendered and entered a final decree ordering, adjudging and decreeing that plaintiff Toucey take nothing by his bill in this cause but that the same be and was thereby dismissed with prejudice at the plaintiff's costs. A copy of said decree, marked Exhibit "D" is hereto attached and by reference made a part hereof; that said decree by its terms made a part thereof the findings of fact and conclusions of law made by the Court in said cause; that by said decree this Court found and ruled that said policy number 8611895 had lapsed and was not and is not in force or effect, that said Toucey was not and had not been totally and permanently disabled as in said policy defined and limited, and that defendant had not been guilty of wrongful or fraudulent conduct which would entitle said Toucey to have said policy reinstated or to treat the same as in force.

[fol. 25] 5. Plaintiff further states that at the trial of said cause both said Toucey as plaintiff and New York Life Insurance Company as defendant offered testimony

upon the issue presented in said cause whether said Toucey was totally and permanently disabled within the meaning of the aforesaid policy from the month of April, 1933 to the date of trial, and that said Court in ruling that said Toucey was not so disabled weighed and considered and ruled upon said evidence.

6. That this Court at the close of the evidence in said cause delivered an opinion therein deciding this cause on the merits, a copy of which, marked Exhibit "E" is hereto attached and embodied herein and by reference made a part hereof; that in said oral opinion said Hon. Merrill E. Otis, Judge of this Court, expressly found and declared that said Toucey was not totally and permanently disabled within the meaning of said policy and said Court expressly made a finding of fact in said opinion and in said cause which by reference is made a part of the decree in said cause, which said finding of fact is as follows:

"I believe that it has not been proved that the plaintiff, within the meaning of this contract, is now or has been at the times alleged in the petition, wholly disabled by bodily injury or disease, so that he is prevented thereby from engaging in any occupation whatever for remuneration or profit, and I think the fact to be that he is not and has not been so disabled. That is finding of fact, I think, No. 2.

Plaintiff further states that the final decree of said Court in said cause was not appealed from or set aside or otherwise made the subject of attack in said cause and was and is a final, conclusive and binding adjudication and is res judicata of and on all of the issues raised or which could have been raised in said cause and particularly the issue whether said policy contract was in force and effect and [fol. 26] the issue whether said Toucey was or had been totally and permanently disabled within the meaning of said policy during and after the month of April, 1933, which said issues were raised and were in issue and were decided by the decree in said cause.

7. Defendant further states that on December 28, 1937 one James Shay commenced an action in the Circuit Court of Jackson County, Missouri, at Kansas City, numbered 457059 in the records of said Court entitled "James Shay,

Plaintiff, vs. New York Life Insurance Company, a corporation, defendant", by filing a petition in said Court, a copy of which, marked Exhibit "F" is hereto attached and hereby, by reference, made a part hereof; and in said petition said Shay alleges, among other things, that he is a citizen and resident of the State of Washington and that the defendant is a corporation existing under the laws of the State of New York; that defendant New York Life Insurance Company issued the policy of insurance No. 8611895 (hereinabove described) to Samuel R. Toucey on April 29, 1924; that said Toucey became wholly and presumably permanently disabled on the 1st day of April, 1933 while said policy was in full force and effect and thereafter while said policy was in full force and effect gave notice to defendant that he was so disabled; that said Toucey had paid all premiums due under said policy at all times mentioned in said petition and that the same was in full force and effect; that said Toucey "prior to the institution of this suit, has assigned all of his right, title and interest in and to any and all claims and demands under said contract of insurance to this plaintiff"; that there is due and payable under said policy by reason of the said permanent disability of said Toucey the sum of Twenty-eight Thousand Dollars ($28,000.00) for which demand has been made on defendant New York Life Insurance Company, which, without [fol. 26a] just cause or excuse, has failed to pay the same; that said company's refusal to pay said claim was and is vexatious. Said Shay prays judgment against defendant for Twenty-eight Thousand Dollars ($28,000.00) with interest and for Twenty-eight Hundred Dollars ($2800.00) for a penalty for vexatious refusal to pay and for the sum of Ten Thousand Dollars ($10,000.00) as a reasonable attorneys' fee and costs. Defendant further states that said cause is returnable to the March, 1938 Term of the Circuit Court convening on March 14th.

8. Defendant further states that if said assignment was made by said Toucey to said Shay the same was made without consideration and wholly and solely for the purpose and with the object of avoiding and defeating the jurisdiction of this Court, and for the purpose and with the object of nullifying the decree of this Court by securing a readjudication in the State Court of the issues presented and

adjudged herein, and that said assignment was and is purely colorable and is a sham and pretext to evade the jurisdiction and the decree of this Court by indirection; that said assignment is a fraud upon this Court and upon this defendant; that if said assignment had not been made and if said suit in the Circuit Court of Jackson County, Missouri, had been brought by said Toucey in his own name said suit would have been removable to and would have been removed to this Court on the grounds of diversity of citizenship; that said assignment was made to defeat the decree and adjudication of this Court, and in defiance and violation thereof and to defeat such removal, and is a result of a collusive and fraudulent plan and agreement between said Toucey and said Shay and is part of a plan, scheme and devise to secure a new adjudication by the Missouri State Courts upon a matter which has already been fully adjudicatd by this Court and to avoid the effect of [fol. 27] the rule of res judicata and to inflict penalties upon this defendant unjustly and inequitably and to collect attorneys' fees, all founded upon a false allegation that this defendant had vexatiously refused to pay the sums which said Shay claims to have demanded from it. Defendant further states that the rights, cause of action and chose in action alleged in said petition to have been assigned to said Shay and sought to be enforced by him in said State Court action are in substance and fact the same identical cause of action, the same rights and the same chose in action sought by said Toucey to be enforced and recovered on in this action, and ruled upon, barred and foreclosed by the decree of this Court aforesaid.

9. Defendant further states that defendant has no adequate remedy at law; that if this Court does not grant relief by a supplemental decree herein defendant will be subjected to a multiplicity of suits and to great expense and harassment and will be required to devote much time and labor to the defense of said suit in said State Court and will be subjected to the attempt to mulct and defraud it hereinabove mentioned and suffer an irreparable injury.

Wherefore, defendant prays the Court to determine and adjudge that the purported and pretended rights attempted to be asserted by the aforesaid Shay in said State Court

suit were finally determined and adjudicated by this Court in the final decree in this case hereinabove mentioned and to determine and declare the said decree to be res judicata upon the rights of the aforesaid Shay in said suit and to order and direct said Toucey to revoke and rescind the aforesaid pretended assignment to said Shay and to order the said Toucey to cause his attorneys, Cornelius Roach, Jr. and M. W. Borders, Jr., who are purporting and pretending to act for said Shay in said State Court suit, while [fol. 28] they are in truth and fact really acting for said Toucey, forthwith to dismiss said State Court case and to make an order that a writ of injunction issue out of and under the seal of this Court restraining and enjoining said Toucey, either in his own name or in the name of any other person as a pretended or purported assignee or as an assignee for the benefit of said Toucey, from bringing or prosecuting any suit or suits in any court or courts, or committing any other act or acts, for the purpose, or having the effect of seeking, a readjudication of the issues adjudged by the aforesaid decree of this Court herein and from making any further such assignment or assignments to any person or persons whomsoever of his purported and pretended right to disability benefits, or to any other benefits under New York Life Insurance Company policy No. 861895, and that this Court issue, or cause to be issued, a restraining order and, upon hearing, a preliminary injunction against said Toucey and his said attorneys for the purpose and to the effect aforesaid; and for such other and further relief as the Court may deem equitable and proper in the premises.

GEORGE J. MERSEREAU,
RICHARD S. RIGHTER,
HORACE F. BLACKWELL, JR.,
Solicitors for Defendant,
New York Life Insurance Company.

State of Missouri,
County of Jackson.—ss.:

Richard S. Righter, being duly sworn, upon his oath states that he is an agent and solicitor for New York Life Insurance Company and states that the matters and facts [fol. 29] set forth in the above supplemental bill in equity

are true, and further states that Exhibits "A", "B", "C", "D", "E" and "F" attached to said bill are true copies.

RICHARD S. RIGHTER.

Subscribed and sworn to before me this 10th day of March, 1938.

MILDRED L. POWERS,
Notary Public, Jackson County,
(Seal) State of Missouri.

My commission expires, September 7, 1941.

Filed in the United States District Court Mch. 10, 1938.

[fol. 30] Exhibit "A".

Petition.

In the Circuit Court of Jackson County, Missouri, at Kansas City.

January Term, 1936.

Samuel R. Toucey, Plaintiff,
No. 443457. vs.
New York Life Insurance Company, a corporation, Defendant.

I.

Comes plaintiff in the above entitled cause and for his cause of action herein states that the defendant is a mutual life insurance company organized and existing under the laws of the state of New York and authorized to do business in the state of Missouri, with a branch office of said company located in Kansas City, Jackson County, Missouri, and as such mutual life insurance company the defendant is authorized and empowered to write insurance policies upon the lives of individuals, providing for the payment of certain sums upon their death or disability, and as such said defendant is liable to suit in the courts of this state.

II.

Plaintiff further states that on the 2nd day of January, 1924, the defendant issued its life insurance policy

#8 611 895 on the life of plaintiff herein by which it agreed to pay plaintiff's beneficiary a death benefit of Fifty Thousand Dollars ($50,000.00) and the sum of Five Hundred Dollars ($500.00) each month during the lifetime of the plaintiff, and also to waive the payment of premiums on said policy if said plaintiff became wholly and presumably [fol. 31] permanently disabled before the age of sixty years by bodily injury or disease, so that he would be thereby prevented from engaging in any occupation for remuneration or profit in case such disability occurred after said policy took effect and before the anniversary at which plaintiff's age at the latest birthday was sixty years; that plaintiff upon delivery of said policy paid a premium of Two Thousand, One Hundred Eighty-two Dollars ($2,182.00) in advance and paid all premiums on said policy until the quarterly premium due on October 2, 1934, which was not paid for the reasons hereinafter set out.

III.

Plaintiff further states that on or about the 1st of July, 1934, and while the aforesaid policy of insurance was in full force and effect, plaintiff had other life insurance with the defendant company, being policies #10 226 440, #10 391 696 and #10 533 974, which, together with the above policy #8 611 895 for the sum of Fifty Thousand Dollars ($50,000.00), provided for One Hundred Thousand Dollars ($100,000.00) death benefits; that on or about the 1st of July, 1934, plaintiff consulted the Treasurer and other agents and employees of the branch office of the New York Life Insurance Company in Kansas City, Missouri, about his life insurance policies with said company, informing said officers and employees at that time that he was totally disabled and had been since April, 1933, because of an operation for stomach ulcers; that he could not work and on that account could not pay the premiums on all the aforesaid life insurance policies, and asked said officers and employees of the defendant company to analyze said policies and advise him as to the coverage of all of his policies with said company, and what values existed in said policies at that time; that the officers, employees and [fol. 32] agents of said Kansas City branch office of the defendant company, although being theretofore advised as to

plaintiff's physical condition, fraudulently advised plaintiff that if he would surrender the three policies number 10 226 440, 10 391 096, and 10 533 974, and reduce the death benefits of his policy #8 611 895 from Fifty Thousand Dollars ($50,000.00) to Twenty-five Thousand Dollars ($25,000.00), with a corresponding reduction in the premium and monthly payment of disability benefits from Five Hundred Dollars ($500.00) per month to Two Hundred Fifty Dollars ($250.00) per month, he would receive approximately Eleven Hundred Fifty Dollars ($1150.00) in cash, and that there would be sufficient values left in said policy #8 611 895 as so reduced to carry such reduced policy until the 2nd of January, 1935.

IV.

Plaintiff further states that after being advised as aforesaid by the officers, employees and agents of the branch office of the defendant company at Kansas City, Missouri, that he would receive approximately Eleven Hundred Fifty Dollars ($1150.00) upon the cancellation of said three numbered policies aforesaid, and the reduction of policy #8 611 895, as aforesaid, on the ..... day of August, 1934, he received notice from said branch office of the defendant company in Kansas City that a mistake had been made in computing his benefits under all of said policies; that instead of the company owing him about Eleven Hundred Fifty Dollars ($1150.00), he would owe the company Two Hundred Thirty-four Dollars ($234.00), and not knowing his rights in the premises, and not knowing whether this advice was correct or not, he paid under protest the quarterly payment due on the 2nd of July, 1934, on said policy #8 611 895. That plaintiff, realizing and believing that [fol. 33] he could not rely upon information received from the branch office of the New York Life Insurance Company wrote the home office of the defendant company in the City of New York, on August 11, 1934, notifying and advising said home office that he had spent several months trying to find out just what his policies were worth, and had found that the advice given him by the Kansas City Office was wrong, and that he desired of the home office that a complete analysis of his four policies be made for coverage and values and that he be advised his exact status and rights under said insurance. He also notified said company

at the same time in writing, while said policy #8 611 895 was in full force and effect, that he was totally disabled and could not work; that his income had ceased and if his insurance was cancelled he could not secure other insurance because of his physical condition; that he had been operated on in April, 1933, for stomach ulcers. That, although this defendant was so notified, said defendant fraudulently failed to advise this plaintiff that if he was totally disabled by disease, his policy provided for certain disability benefits because of such disease, defendant knowing and being advised in writing that plaintiff did not know his rights under said policy and the coverage thereof, and was asking defendant company for advice as to the coverage of said policy, and the defendant knowing that plaintiff was ignorant of his rights under said policy, and knowing that plaintiff was totally disabled and had been since April, 1933, and defendant knowing that plaintiff was unable to work and could not pay the premiums on his insurance policies, and knowing that the plaintiff had been wrongfully advised as to his rights under his policies by the officers and agents of said defendant company's branch office in Kansas City, Missouri, and knowing that at the time said policy #8 611 895 was issued to plaintiff, in the year 1924, plaintiff was then of the age of forty-five years, and knowing that plaintiff was of the age of fifty-five years at [fol. 34] the time it received notice of his total disability, it fraudulently and intentionally failed to advise the plaintiff of his rights under said policy #8 611 895, and fraudulently induced the plaintiff to reduce said insurance from a principal sum of Fifty Thousand Dollars ($50,000.00) to Twenty-five Thousand Dollars ($25,000.00), and fraudulently reduced the disability benefits thereof from Five Hundred Dollars ($500.00) per month to Two Hundred Fifty Dollars ($250.00), per month, and that because of said actions by defendant and its fraudulent failure and refusal to advise plaintiff of his rights under said policy, plaintiff was led by the conduct and actions and silence of the defendant, as aforesaid, to make said reductions in said policy, as aforesaid, and because of said facts as herein alleged, plaintiff acted to his irreparable injury and defendant is now estopped to claim or assert that due proof was not made on August 11, 1934, of total and permanent disability as provided by the terms of said policy.

V.

Plaintiff further states that at the time said defendant company attempted to reduce said policy, said defendant knew, by written notice dated June 29, 1934, that plaintiff was totally and permanently disabled, and knew that the contingent rights of plaintiff to disability benefits and waiver of premiums under the terms of said policy had then become fixed liabilities of the defendant company, and well knew that the plaintiff was ignorant of his rights under said policy, fraudulently reduced same, as aforesaid, without any consideration whatever for said reduction, and that said reduction of said policy both as to death and disability benefits was wholly without consideration and fraudulent and void as aforesaid.

VI.

Plaintiff further states that in September, 1935, and a few days after being advised by a medical examiner that [fol. 35] his policy covered disability benefits for disease, plaintiff made oral demand upon the defendant company at its branch office in Kansas City for the payment of disability benefits, and the reinstatement of his policy #8 611 895, which defendant had unlawfully cancelled because of the alleged failure to pay the premium due on October 2, 1934, thereon, but that defendant failed and refused on September 26, 1935, to reinstate said policy so unlawfully cancelled and to pay any disability benefits thereunder, for the reason stated in its written notice to the Kansas City branch office of the New York Life Insurance Company that due proof had not been given within six months after the cancellation of such policy, although this defendant well knew that in June and August, 1934, and while said policy was in full force and effect, it had received written notice of the total disability of plaintiff by disease, and his inability to pay premiums on said policies, and defendant well knowing that plaintiff was then under the age of sixty years, and that said disability benefits had continued for more than three months, and well knowing that said policy provided for the waiver of premiums and the payment of monthly benefits so long as said total disability should continue, and well knowing that the plaintiff did not know of his rights under said pol-

icy, and well knowing that plaintiff had asked for an analysis of his policies of the defendant company at its home office in New York City, knowingly and fraudulently and intentionally failed and refused to advise plaintiff as to his rights, and failed and refused to advise him that said policy would be kept in force by the waiver of premiums if he was totally disabled, and misled the plaintiff to his irreparable injury, and unlawfully and fraudulently cancelled said policy #8 611 895, although plaintiff has paid defendant in premiums on said policy approximately Twenty-two Thousand Dollars ($22,000.00).

[fol. 36] VII.

Plaintiff further states that he faithfully and fully performed all the terms and conditions of said policy, and that he was wholly and presumably permanently disabled before reaching the age of sixty years and has been since April, 1933, when he was fifty-four years of age, and that he was so totally and wholly disabled by disease so that he is prevented thereby from engaging in any occupation whatsoever for remuneration or profit, and that he was so totally disabled for more than three consecutive months immediately before August 11, 1934, when he gave the defendant company at its home office in the City of New York notice of such total and permanent disability by disease, and that he is still totally and permanently disabled, and that said policy #8 611 895 was in full force and effect when his disability as aforesaid was incurred, and that he was so disabled as aforesaid on August 11, 1934, while said policy was in full force and effect and before any default in the payment of the October, 1934, premium thereon; that although defendant knew of such disability and that plaintiff was wholly disabled by disease, as aforesaid, on and for many months before August 11, 1934, and knowing that plaintiff at the time of his disability was under the age of sixty years, and knowing that said policy, at the time defendant received written notice at its home office in New York of such disability, was in full force and effect, and knowing that plaintiff was asking the officials, officers and agents of the defendant company at its home office in New York to advise him as to the coverage of said policy and his rights thereunder, that said defendant fraudulently and wilfully failed and refused to advise the

plaintiff, although it was its duty so to do, but on the contrary led plaintiff to believe that his only rights under said policy were to either pay the premiums thereon or to carry the same as long as it could be carried as extended insurance, and thereby misled the plaintiff, to his irreparable damage.

[fol. 37] Plaintiff further states that because of the foregoing, he is entitled under the facts herein alleged to have the attempted reduction of his policy #8 611 895 set aside and for naught held, and to have the attempted cancellation of said policy adjudged to be of no force and effect, and that he is entitled to recover of defendant disability benefits under said policy as provided for therein from August 11, 1934, and for the waiver of premiums on said policy so long as plaintiff is totally and permanently disabled because of disease.

VIII.

Wherefore, plaintiff prays that said policy #8 611 895 of the defendant company be adjudged to be in full force and effect, and that said policy be reinstated and that the attempted reduction thereof as of July 2, 1934, be declared to be null and void, and that the premiums thereon be declared waived by the defendant company because of the total and permanent disability of the plaintiff for such time that such disability shall continue, and further prays for the recovery of the sum of Five Hundred Dollars ($500.00) for diability benefits per month from August 11, 1934, and for return of the said premium paid for the quarter beginning July 2, 1934, and for interest on each of these sums at the rate of six per cent. (6%) per annum, and plaintiff prays for such other and further relief as to the court seems meet and equitable and for the costs of this suit.

CHAS. M. HOWELL,
CHAS. M. HOWELL, JR.,
WM. H. ALLEN,
SCOTT R. TIMMONS,
Attorneys for Plaintiff.

[fol. 38] Exhibit "B".

Answer and Motion to Dismiss.

In the District Court of the United States for the Western Division of the Western District of Missouri at Kansas City.

November Term, 1935.

Samuel R. Teucey, Plaintiff,
No. 2810. vs. In Equity.
New York Life Insurance Company, a Corporation, Defendant.

Motion to Dismiss.

Comes now defendant in the above entitled cause and moves the Court to dismiss said cause on the ground and for the reason that plaintiff's petition herein does not state facts sufficient to constitute a cause of action against this defendant and does not state facts sufficient to entitle the plaintiff to the relief prayed for in said petition.

Wherefore, defendant prays that said cause be dismissed and that defendant have its costs herein incurred and expended.

Answer.

Comes now defendant in the above entitled cause and for its answer to plaintiff's petition states:

1. Answering the first paragraph of said petition, the defendant admits all of the allegations therein contained.

2. Answering paragraph 2 of said petition, defendant admits that on January 2, 1924 defendant issued its policy of life insurance No. 8611895 on the life of plaintiff; admits [fol. 39] that the terms thereof are in part substantially as set forth in said paragraph 2. Defendant denies that plaintiff paid all premiums on said policy until the quarterly premium due October 2, 1934, but admits that the premium due that day was not paid.

3. Answering paragraph 3, defendant admits that said policy No. 8611895 was in force and effect on the first day of July, 1934; admits that plaintiff had other insurance

with defendant, being policies Nos. 10226440, 10391096 and 10533974, and admits that the sum or face amount of all four of said policies was One Hundred Thousand Dollars ($100,000.00). Defendant denies that on or about July 1, 1934, plaintiff consulted the "treasurer" of the branch office of defendant in Kansas City, Missouri, about his life insurance, and states that no person with the title of "treasurer" is employed in said office; that defendant is without knowledge what other employees of said branch office were consulted by plaintiff, and defendant is without knowledge what plaintiff said to said employees, but defendant states that defendant cannot discover any employee of said branch office to whom plaintiff stated that he was totally disabled and had been since April, 1933 because of an operation for stomach ulcers, or to whom he stated that he could not work and on that account could not pay the premiums on all the aforesaid life insurance. Defendant therefore requests that strict proof of said allegations be required, and that plaintiff be required to state in his petition the names of the employees to whom he claims to have made the statements mentioned in paragraph 3 of said petition. Defendant is without knowledge whether plaintiff stated to any employee of said branch office, and to what, if any, such employee plaintiff stated that plaintiff wished defendant to analyse his policies and advise him as to the coverage of all of his policies issued by defendant, [fol. 40] and what values existed in said policies at that time. Defendant asks that strict proof of said allegation be required. Defendant denies that any of the employees in defendant's Kansas City branch office advised plaintiff fraudulently, and denies that said employees advised plaintiff in the manner or to the effect stated in said paragraph 3.

Further answering said paragraph 3, defendant states that none of the employees of said branch office is an "officer" of defendant, and that none of said employees is, or was at the time mentioned in said paragraph 3, authorized by defendant to advise policy holders on its behalf or in its name with respect to the meaning and legal effect of its policies, or to advise plaintiff in the manner or to the effect alleged in said paragraph 3; that any such advice to plaintiff, if given, was not and is not binding on this defendant.

4. Answering paragraph 4 of plaintiff's petition, defendant states that it is without knowledge what notice plaintiff received from said branch office, or what mistake said branch office had made in computing plaintiff's benefits under said policies, but denies that plaintiff paid under protest the quarterly premium due on the second of July, 1934 on policy No. 8611895, and states that, even if made, such protest would have been without effect in law. Defendant denies that it received any letter whatsoever from plaintiff written on August 11, 1934, and denies that it fraudulently failed to advise the plaintiff of his rights under said policy No. 8611895, and denies that it fraudulently induced the plaintiff to reduce his insurance from Fifty Thousand Dollars ($50,000.00) to Twenty Five Thousand Dollars ($25,000.00), or fraudulently reduced the disability benefits from Five Hundred Dollars ($500.00) per month to Two Hundred and Fifty Dollars ($250.00) per month. Defendant states that it was under no obligation whatsoever to advise plaintiff with respect to the meaning and legal effect of his said policy or policies and [fol. 41] denies that it did so advise him. Defendant denies that it is estopped to claim that due proof was not made of total and permanent disability as required by the terms of said policy No. 8611895.

5. Answering paragraph 5 of said petition, defendant denies that it knew by written notice dated June 29, 1934 that plaintiff was totally and permanently disabled, and states that it never received any such notice, and denies each and every other allegation in paragraph 5 of said petition contained.

6. Answering paragraph 6 of said petition, defendant denies that plaintiff made oral demand upon defendant's branch office for the payment of disability benefits and the reinstatement of policy No. 8611895, and denies that any such oral demand made by plaintiff upon said branch office would be, or was, binding upon this defendant, and states that plaintiff was not entitled to any sum or sums whatever from defendant for disability benefits under said policy No. 8611895, and denies that defendant unlawfully cancelled said policy, and states that on the contrary, said policy lapsed for failure to pay a premium or premiums

due thereon; defendant states that plaintiff was not entitled to have said policy reinstated on September 26, 1935, and denies that defendant knowingly and fraudulently and intentionally failed and refused to advise plaintiff as to his rights, and states that defendant was under no legal duty or obligation to advise plaintiff of his rights with respect to the matters set forth in said Count, and denies each and every other allegation contained in said paragraph 6.

7. Answering paragraph 7, defendant denies that plaintiff faithfully and fully performed all the terms and conditions of said policy, and denies that he was wholly and presumably permanently disabled since April, 1933, and de- [fol. 42] nies that he was so totally disabled by disease that he was prevented thereby from engaging in any occupation whatsoever for remuneration or profit, and denies that he was totally disabled for more than three consecutive months immediately before August 11, 1934, and denies that on that day he gave defendant notice at its home office of such alleged total and permanent disability, and denies that plaintiff is still totally and permanently disabled, and denies that defendant knew that plaintiff was so disabled on and for many months before August 11, 1934, and denies that defendant fraudulently and wilfully failed and refused to advise plaintiff, and denies that it was defendant's duty to advise plaintiff, and denies that defendant led plaintiff to believe that his only rights under said policy were to pay the premiums thereon or carry the same as long as it could be carried as extended insurance, and denies that it misled plaintiff to his irreparable damage, and denies that plaintiff is entitled to have the alleged reduction of policy No. 8611895 set aside and for naught held, and to have the attempted cancellation of said policy adjudged to be of no force and effect, and denies that plaintiff is entitled to recover any disability benefits under said policy whatsoever.

8. Further answering said petition, defendant states that on August 7, 1934 plaintiff made written application to defendant for the payment of the cash surrender value of New York Life Insurance Company policy No. 10226440; that on August 13, 1934 plaintiff made written application to defendant for the payment of the cash surrender value of New York Life Insurance Company policy No. 10391096;

that on July 31, 1934 1934 plaintiff made written application to defendant for the reduction of New York Life Insurance Company policy No. 8611895 from the face amount of Fifty Thousand Dollars ($50,000.00) to a face amount of Twenty Five Thousand Dollars ($25,000.00) with the corresponding reduction in all of the other benefits there- [fol. 43] under; that pursuant to said applications, defendant paid to plaintiff on August 7, 1934, the sum of Seven Hundred Seventeen Dollars and Thirty One Cents ($717.31). being the full cash surrender value of policy No. 10226440, and the sum of Four Hundred Thirty Five Dollars and Eleven Cents ($435.11), being the full cash surrender value of policy No. 10391096; that plaintiff thereupon accepted said sums as and for the cash surrender value of said policies and surrendered said policies to this defendant to be cancelled; that thereafter and on September 26, 1934, pursuant to plaintiff's application and request, defendant duly endorsed upon policy No. 8611895 the reduction of the face amount thereof to Twenty Five Thousand Dollars ($25,000.00) and the reduction of the amount of the other benefits in said policy to one-half thereof, including the reduction of the amount of disability benefits payable under said policy in the event of total and permanent disability, as in said policy defined, from the sum of Five Hundred Dollars ($500.00) per month to the sum of Two Hundred and Fifty Dollars ($250.00) per month; that thereafter and on October 2, 1934, a quarterly premium in the amount of Two Hundred Eighty Nine Dollars and Twenty Five Cents ($289.25) became due upon said policy No. 8611895; that on November 2, 1934, being the last of the days of grace in which by the terms of said policy plaintiff was entitled to pay the premium thereon falling due on said October 2, plaintiff delivered to defendant his check drawn on the Commerce Trust Company for the sum of Two Hundred Eighty Nine Dollars and Twenty Five Cents ($289.25); that said check was deposited by defendant in The First National Bank of Kansas City for collection and thereafter was returned to defendant by said bank not honored; that thereupon said policy No. 8611895 lapsed for failure to pay said premium due October 2, 1934; that on November 21, 1934, defendant sent a letter to plaintiff and enclosed said check in said letter and notified [fol. 44] plaintiff that because said check had been returned

by the bank not honored, plaintiff's policy had been lapsed on the books of the company, and urged the plaintiff, on receipt of said letter, to apply for the reinstatement of said policy on the enclosed form and to return it to defendant with the sum of Two Hundred Ninety One Dollars and Twenty Five Cents ($291.25), being the amount of the premium due October 2, 1934, plus accrued interest, all for the purpose of having said policy reinstated if plaintiff elected to reinstate said policy; that defendant also attached to said letter a medical examination form to be completed by one of the company's approved examiners as a part of the process of reinstating said policy; that plaintiff never paid said premium due October 2, 1934 and never took the steps necessary for the reinstatement of said policy, and said policy lapsed and has ever since been void for failure to pay said premium; that thereafter and on the third day of April, 1935, defendant, at the request of plaintiff, duly paid to plaintiff the sum of One Hundred Three Dollars and Forty Six Cents ($103.46), being the cash surrender value of New York Life Insurance Company policy No. 10533974; that said sum was received and was accepted by plaintiff, who thereupon surrendered said policy to defendant and the same was thereupon cancelled.

9. Defendam further states that said policy No. 8611895 provides in part:

"And the Company Agrees to Pay to the Insured Five Hundred Dollars each month ($10 Per $1,000 of the face of this policy) during the lifetime of the Insured, and also to waive the payment of premiums, if the Insured becomes wholly and presumably permanently disabled before age 60, subject to all the terms and conditions contained in Section 1 hereof."

that section 1 of said policy provides:

"Disability Benefits

1. Total Disability.—Disability shall be deemed to be total whenever the Insured is wholly disabled by bodily [fol. 45] injury or disease so that he is prevented thereby from engaging in any occupation whatsoever for remuneration or profit.

2. Permanent Disability.—Disability shall be presumed to be permanent,—(a) Whenever the Insured will presumably be so totally disabled for life; or—(b) After the Insured has been so totally disabled for not less than three consecutive months immediately preceding receipt of proof thereof.

3. Benefits.—Upon receipt at the Company's Home Office, before default in payment of premium, of due proof that the Insured is totally and presumably permanently disabled and that such disability occurred after the insurance under this Policy took effect and before its anniversary on which the Insured's age at nearest birthday is sixty years, the following benefits will be granted.

(a) Income Payments.—The Company will pay to the Insured a monthly income of $10 per $1,000 of the face of the policy during his lifetime and continued disability, beginning immediately on receipt of said proof. Any income payment due before the Company approves the proof of disability shall be payable upon such approval. If disability results from insanity, income payments under this section will be paid to the beneficiary in lieu of the Insured.

(b) Waiver of Premiums.—The Company wil waive payment of any premium falling due after approval of said proof and during such disability. Any premium due prior to such approval is payable in accordance with the terms of the policy, but if due after receipt of proof will, if paid, be refunded upon approval of proof.

4. In the event of default in payment of premium after the Insured has become totally disabled, the policy will be restored upon payment of arrears of premium with interest at 5%, provided due proof that the Insured is totally and presumably permanently disabled, as herein defined, is received by the Company not later than six months after said default and the benefits under this section shall then be the same as if said default had not occurred.

5. It is further agreed that the total and irrecoverable loss of the sight of both eyes, or of the use of both hands

or of both feet or of one hand and one foot shall be considered total and permanent disability.

6. Recovery from Disability.—The Company may from time to time demand due proof of the continuance of total disability, but not oftener than once a year after it has continued for two full years. Upon failure to furnish such proof, or if at any time it shall appear to the Company that the Insured is able to engage in any occupation for remuneration or profit, no further income payments shall be made nor premiums waived.

7. The sum payable in any settlement of the policy shall not be reduced by income payments made nor by premiums waived under the above provisions. Dividends, loan and surrender values shall be the same as if the waived premiums had been duly paid. If any benefit under this section is unpaid at the time of the Insured's death it shall be payable to the person entitled to the proceeds of the policy.

8. These Disability Benefits will not apply if the disability of the Insured shall result from self-inflicted injury or from military or naval service in time of war."

[fol. 46] Defendant further states that by the aforesaid endorsement the amount of said monthly disability benefits was duly reduced to the sum of Two Hundred Fifty Dollars ($250.00) per month; that defendant never at any time while said policy was in force received from plaintiff any claim that plaintiff was entitled to disability benefits under said policy and never received from plaintiff at its home office before default in payment of premium due proof that the insured was totally and presumably permanently disabled, and that such disability occurred after the insurance under this policy took effect and before its anniversary on which the insured's age at nearest birthday was 60 years; that plaintiff is not entitled to any of the relief prayed for in plaintiff's petition, and is not entitled to any disability benefits or any benefits whatever of any kind or character under said policy.

Wherefore, having fully answered plaintiff's petition, defendant prays that this suit be dismissed with prejudice and that defendant have its costs herein incurred and expended.

GEORGE J. MERSEREAU,
RICHARD S. RIGHTER,
HORACE F. BLACKWELL, JR.,
Attorneys for Defendant.

[fol. 47] Exhibit "C".

Reply.

In the District Court of the United States For the Western Division of the Western District of Missouri at Kansas City.

April Term, 1936.

Samuel R. Toucey, Plaintiff,
No. 2810. vs. In Equity.
New York Life Insurance Company, a corporation, Defendant.

Comes now plaintiff herein and in reply to the answer of defendant states:

1. In reply to the allegations of paragraph 3 of defendant's answer, plaintiff states that he conferred with L. C. Schellhorn, cashier of the branch office of the New York Life Insurance Company, of Kansas City, Missouri, and Mr. M. M. McKenny of said branch office and a Mr. Wells of said branch office and other employees and agents thereof whose names he does not now recall prior to July 1, 1934, concerning his life insurance with said New York Life Insurance Company and requested a complete analysis of his policies and advised said agents, servants and employees of said New York Life Insurance Company of his total and permanent disability as alleged in plaintiff's petition. And in further reply to said paragraph 3 states that the defendant, New York Life Insurance Company, held out to plaintiff that said cashier and said officers and agents aforesaid had the authority to analyze insurance policies for coverage and to give advice to policyholders thereon and to receive from policyholders communications, both written and

oral, as to the physical condition and disability of such policyholders and that the plaintiff dealt with said cashier and officers and agents aforesaid with the understanding and belief that they had the authority to so advise and inform [fol. 48] plaintiff and that the defendant is estopped, by holding out to plaintiff that said cashier and other officers and employees of its branch office of Kansas City, Missouri, had the authority to analyze policies and advise policyholders thereon, to now assert that said cashier and said agents and employees had no such authority, if in fact they had no such actual authority, which latter fact plaintiff denies.

2. Further answering paragraph 9 of defendant's answer, plaintiff admits that said policy No. 8611895 contains the provisions quoted from said policy and set out in paragraph 9 and further replying, denies that plaintiff did not furnish due proof to the home office of defendant company of his total and permanent disability while said policy was in force but avers that by letter of June 29, 1934, and by letter of August 11, 1934, as alleged in plaintiff's petition, that said plaintiff advised said defendant company at its home office in New York that he was totally disabled and had been since his operation for ulcer early in the year 1933 and by said letters advised said company that he was out of work and could not work because of his physical condition and could earn no money to pay premiums because of such disability and that he could not take out new insurance because of such condition and requested an analysis of his policies for coverage and that such letters constituted due proof of his total and permanent disability under the terms of said policy and that also his oral statements to the officers, agents and employees of the branch office of defendant company in Kansas City, Missouri, as aforesaid, advising of his total and permanent disability and that same had existed prior to 1934 constituted due proof of said total and permanent disability and further alleges that said company upon receipt of such due proof did not request any further or additional proof or did not advise the plaintiff that he should make any further formal proof of his total and permanent disability and is now estopped by its conduct as aforesaid and by its silence as alleged in plaintiff's [fol. 49] petition from now asserting or claiming that due

proof was not made by plaintiff of his total and permanent disability even if the matters aforesaid should not constitute due proof of such as provided by the terms of said policy.

Further replying, plaintiff denies each and every other allegation of new matter contained in defendant's answer.

Wherefore, having fully replied to defendant's answer, plaintiff prays for relief as in his petition herein.

Attorneys for Plaintiff.

[fol. 50] Exhibit "D".

Decree.

In the District Court of the United States For the Western Division of the Western District of Missouri, at Kansas City.

Samuel R. Toucey, Plaintiff,
No. 2810. vs. In Equity.
New York Life Insurance Company, a Corporation, Defendant.

Now on this day, the above entitled cause coming on to be heard before the court on the 18th day of November, 1936, upon the pleadings, the evidence, and the argument of counsel, and the hearing of said cause having extended to this date, and the court having duly heard and considered the evidence and the argument of counsel, the court finds that plaintiff is not entitled to the relief prayed for in plaintiff's petition and bill in equity herein. The court hereby makes a part hereof the findings of fact and conclusions of law made by the court herein.

Wherefore, it is by the court hereby Ordered, Adjudged, and Decreed, that plaintiff take nothing by his bill herein, but that the same be, and is hereby, dismissed with prejudice at the plaintiff's costs.

MERRILL E. OTIS,
Judge.

Dated at Kansas City, Missouri, this 22 day of November, 1936.

[fol. 51] Exhibit "E".

(Opinion.)

The Court: The argument in this case has now been concluded and the case is to be decided. During the trial of the case, which has continued for several days—this is the fourth day of the trial—I have had opportunity to consider such legal questions as were presented. I have been aided in considering those legal questions by the argument of counsel. I have never thought there was any good reason for delaying the decision of a case tried to the Court, either a law case or an equity case, unless it was found that there were problems of such difficulty as that time should be given to their consideration. If this were a law case and tried to a jury, of course, it would be necessary for the Court to pass upon the issues of law and to submit the case at once to the jury for the decision of the issues of fact. An equity case and a jury waived law case should be decided with equal expedition if it is possible to do so.

It is possible to decide this case now, to decide both such issues of law as require decision and such issues of fact as require decision. I may say that I intend to decide only such issues of law and issues of fact as do require decision in order that the case may be decided.

I begin this oral opinion, after the introductory remarks thus made, by saying that there are certain facts about which there is no controversy, which may be stated now. The plaintiff in this case, Major Samuel R. Toucey, had a contract of insurance with the defendant. It has been offered in evidence as Plaintiff's Exhibit 1. The number of that contract or policy, as it is generally called, was 8,611,895. It provided for the payment of $50,000 to the

beneficiary upon due proof of the death of the insured while [fol. 52] the policy was in full force and effect; for the payment of $100,000 as double indemnity upon due proof that his death resulted directly and independently of all other causes from bodily injury effected solely through accidental cause (with other requirements) and it provided for the payment of $500 per month by way of disability benefits if the insured should be wholly and permanently disabled before the age of 60 (with certain other requirements).

That policy was issued, that contract was entered into, January 2, 1924. On September 26, 1934, the plaintiff surrendered that policy voluntarily and took back the same policy, as I understood it, but with a provision that the principal amount to be paid upon his death should be $25,000 instead of $50,000, with corresponding reductions in the other indemnities provided for in the policy.

Concerning the facts I have thus far stated there is no controversy. It is contended by the plaintiff, and that contention is embodied in his bill in this proceeding, that on September 26, 1934, and before and after that time, he was totally and permanently disabled, that the defendant induced him by fraud to consent to the surrender of what I shall speak of as the $50,000 policy, and to the substitution of what I shall speak of as the $25,000 policy (although I understand that there was not actually a substitution of one policy for another, but a modification of the indemnities provided for in the $50,000 policy) and that since he was induced to surrender the $50,000 policy by the fraud of the defendant, he is entitled to have the result of that fraud set aside, and, in effect, to have reinstated the $50,000 policy.

If the $50,000 policy is reinstated then as further relief in this litigation, the plaintiff seeks to recover under the so reinstated policy upon the theory that he was totally and permanently disabled while it was still in full force and effect, that is, that at the time of the substitution and ever [fol. 53] since has been totally and permanently disabled and therefore is entitled to a waiver of any premiums from the date he became totally and permanently disabled, and to the indemnity provided for in the policy for total and permanent disability. Of course, the plaintiff does not ask

in this proceeding this pecuniary relief unless he is first granted that upon which it depends, that is to say, the reinstatement of the $50,000 policy.

What is the fraud which the plaintiff alleges was committed by the defendant on account of which he is entitled to the reinstatement of the $50,000 policy? As I understand it, his contention is that under the facts and circumstances disclosed in evidence in this case, it was the duty of the defendant to advise him that the $50,000 policy contained a provision entitling him to a $500 monthly indemnity for total and permanent disability; that the defendant, although asked by the plaintiff for advice as to the coverage of that policy, concealed from the plaintiff the fact that the policy did include such a provision as that I have just described, and that by this concealment he was led to consent to the surrender of the $50,000 policy and the substitution of the $25,000 policy.

The determination of this contention involves a decision of an issue of law and an issue of fact. With reference to the issue of law which is involved, I declare the law to be, and this may be referred to in the record now being made, as Conclusion of Law No. 1. I declare the law to be that if the defendant did, with the intention of misleading the plaintiff or knowing that the plaintiff would be misled thereby, did, having been called upon by the plaintiff to advise the plaintiff as to the coverage of the $50,000 policy, and more particularly to advise the plaintiff as to whether that policy included a provision of indemnity on account of total and permanent disability, if, under those circumstances the defendant untruthfully advised the plaintiff [fol. 54] and advised him that the policy did not include such a provision, or if the defendant, by failing to fully advise the plaintiff, concealed from him the fact that the policy did contain such a provision, and if the defendant so led the plaintiff to consent to the surrender of his $50,000 policy and to the substitution therefor of a $25,000 policy, and if the plaintiff did not know or was not in law conclusively presumed to know that the $50,000 policy did contain a provision for indemnity for total and permanent disability, and if, therefore, the plaintiff was deceived by the concealment, if any, of the defendant, then the plaintiff

is in equity entitled to a decree reinstating the $50,000 policy.

In connection with this declaration of law, and as a corollary thereto, the Court further declares the law to be: that under the facts and circumstances of this case, an insured to whom a policy of insurance has been delivered, who has that policy in his possession, if there is nothing in the application for the policy that is inconsistent with the terms of the policy, is conclusively presumed to know the provisions of the policy, and that under the facts and circumstances of this case, this plaintiff was conclusively presumed to know that the $50,000 policy did contain a provision entitling the insured under certain conditions therein stated to the indemnity mentioned of $500 per month upon receipt of due proof that the insured was totally and permanently disabled.

Now, having thus declared the law, I decide an issue of fact, which may be described in the record as the Court's Finding of Fact No. 1. I find the fact to be that the defendant did not in any manner or by any means conceal from the plaintiff that the $50,000 contract or policy of insurance did contain a provision for indemnity against total and permanent disability; on the contrary, the defendant advised the plaintiff that it contained such a provision.

[fol. 55] In view of the finding of fact just made, it is now proper to state a second conclusion of law, which is now stated as the Court's Conclusion of Law No. 2: Under the facts and circumstances of this case, as shown in the evidence in this case, the defendant did not by any fraud on its part induce the plaintiff to consent to the surrender of the $50,000 policy or to the substitution therefor of the $25,000 policy.

Perhaps it is unnecessary to go any further in this oral opinion. What I have thus far said fully determines the case. I think, however, that I should make one further finding of fact concerning an issue of fact that is involved in the case, although perhaps its decision, in view of what I have already said, is not absolutely necessary.

If the decision of that issue of fact which was decided in finding of fact No. 1 had been otherwise, and if the law

as set out in conclusion of law No. 1 had been otherwise, and if, therefore, it had been decided that the plaintiff was entitled to a reinstatement of the $50,000 policy, then it would have been necessary to have determined whether he was totally and permanently disabled as alleged in his bill, and whether, also, he had made proper proofs as required by the policy.

Now, I do not intend to pass upon the issue of fact as to whether the plaintiff mailed the letters described in evidence as Exhibits 3 and 4, and whether the defendant received those letters. The testimony of the plaintiff and of his secretary was to the effect that the two letters were mailed, and I have no reason to doubt that they were mailed. These witnesses, one of them the plaintiff, was, of course, interested in the result of the case, but I am certain that neither he nor his secretary would swear falsely about a fact of this kind. While I do not make any decision as to that issue, I have no doubt at all that the letters were [fol. 56] mailed as the witnesses testified that they were mailed. Whether they were received I do not know.

The evidence on that matter introduced by the defendant was to the effect that the careful search for the letters did not discover them in the files of the company. I am very sure that a careful search was made, and I am very sure that there was no attempt by these witnesses to deceive the court. I am very sure, for example, that the hypothetical situation presented by counsel for the plaintiff, that they might have had the letters actually on the desk before them, was not the fact. That would imply that they were criminals and perjurers, attempting to deceive, and I do not believe that as to these witnesses or as to any other witnesses who have testified in this case. I do not pass upon that issue of fact, but I do believe that a finding of fact should be made upon the issue as to whether the plaintiff was totally and permanently disabled within the meaning of this policy.

I say that the plaintiff has made a most favorable impression upon me. He is a man of capacity and integrity and of high standing, and I believe his testimony fully as to the nature of his malady, but because I do believe him to be a man of great ability intellectually, and of

much experience in the business world, I cannot believe, and do not believe that within the meaning of this contract of insurance that we have here, the $50,000 policy, I do not believe that he is so disabled by his malady and disease as that he is prevented thereby from engaging in any occupation whatsoever for remuneration or profit. In the light of all of the other testimony in this case, of all of the medical testimony, I think it is impossible to come to the conclusion that this plaintiff is so totally and permanently disabled. I can understand his viewpoint. I can understand what I think is the viewpoint of his learned counsel. He certainly is totally disabled, I would think, [fol. 57] from carrying on the same kind of a business enterprise as that upon which he was engaged and at which he was very successful. He cannot do that nor anything of that character, but it is an incorrect interpretation of this contract to conclude that if he cannot do what he did do therefore, he is totally disabled within the meaning of this contract. This contract says that to be totally disabled he must be unable to engage in any occupation whatsoever for remuneration or profit. Now, that means any one of a thousand occupations. I have not the slightest doubt but that the plaintiff has the ability, for example, to carry on the occupation of clerk of this court, of the deputy clerk who sits here in this chair, or work of any similar character. I believe that it has not been proved that the plaintiff, within the meaning of this contract, is now or has been at the times alleged in the petition, wholly disabled by bodily injury or disease, so that he is prevented thereby from engaging in any occupation whatever for remuneration or profit and I think the fact to be that he is not and has not been so disabled. That is finding of fact, I think, No. 2.

I do not go further.

To the conclusions of law stated by the Court, and to each of them, the plaintiff is allowed an exception. The plaintiff has requested the Court state certain conclusions of law which are numbered 1 to 8, inclusive, each of which the Court has carefully considered and each of which the

Court declines to state as the Court's conclusion of law. To the refusal of the Court to give each of these conclusions of law as requested by the plaintiff, the plaintiff is allowed an exception.

(Which said conclusions of law numbered 1 to 8, both inclusive, and each of them, so offered by the plaintiff, and refused by the Court, over the objection and exception of the plaintiff, are in words and figures as follows:)

[fol. 58] "1. That plaintiff is now, and was for more than three (3) months prior to June 29, 1934, totally disabled from disease, as said terms are used and defined in policy No. 8611895 issued by defendant to plaintiff.

2. That the evidence herein creates a presumption that the letters written defendant by plaintiff of June 29, 1934, and August 11, 1934, were each received by defendant at its home office in New York City and that there is insufficient evidence herein to rebut such presumption.

3. That the letters of June 29, 1934, and August 11, 1934, received by defendant at its home office in New York City, not being objected to by the defendant at the time they were received as being insufficient or incomplete, constituted due proof of disability within the meaning of said policy No. 8611895, and that defendant is estopped to assert that said letters did not constitute such due proof.

4. That the failure of defendant to answer the said letters of June 29, 1934, and August 11, 1934, and to advise plaintiff thereby of his rights under said policy No. 8611895 to disability benefits and a waiver of premiums, was in law and equity a fraud upon the rights of plaintiff.

5. That plaintiff, in agreeing to a reduction of the death and disability payment benefits under said policy when he did not know and was not advised of his rights thereunder to disability benefits from disease and waiver of premiums in case of total disability by disease, is not estopped from suing for the reinstatement of said policy No. 8611895 and from recovering disability benefits thereunder.

6. That plaintiff did not get the kind of insurance his written application called for and plaintiff was entitled to

rely on the presumption that the policy received, No. 8611895, was in accordance with his application and that, therefore, the presumption that plaintiff knew the contents of said policy does not apply and plaintiff is not chargeable with negligence for failure to examine such policy to discover errors.

7. That plaintiff is entiled to a reinstatement of policy No. 8611895 with defendant company.

8. That plaintiff is entitled to recover of defendant disability benefits under said reinstated policy No. 8611895 from August 20th, 1934, to this date, at the rate of $500.00 per month, together with 6% interest thereon from said August 20th, 1934, said recovery for disability benefits from November 20th, 1934, being for $13,500.00 and interest on each monthly payment from date due to this date, being $815.50, or the total sum that plaintiff is entitled to recover from defendant to this date being Fourteen Thousand Three Hundred Fifteen and 50/100 Dollars ($14,315.50).

[fol. 59] The defendant has asked certain conclusions of law which the Court declines to give, merely because the Court has stated such conclusions of law as he believes are required in the case, and that it is unnecessary to make other declarations or state any other conclusions of law. To the Court's failure to give the conclusions of law requested by the defendant, the defendant also is allowed an exception, and as to each of them, a separate exception.

(Which said conclusions of law, and each of them, so offered by the defendant, and refused by the Court, over the objection and exception of the defendant, are in words and figures as follows:)

"1. Defendant was under no legal duty to advise plaintiff that New York Life Insurance Company policy No. 8611895 contained a provision for disability benefits, even if defendant knew that plaintiff was ignorant of that fact, and even if defendant knew (which the court does not, however, find) that plaintiff was totally and permanently disabled within the meaning of said policy.

2. Oral notice by plaintiff to one or more of the employees in defendant's Kansas City branch office that

plaintiff was totally and permanently disabled is not "due proof" of disability within the meaning of Section 1 of New York Life Insurance Company policy No. 8611895, and would not entitle plaintiff to receive the disability benefits under said policy.

3. Neither of the two letters, one dated June 29, 1934, and the other dated August 11, 1934, which plaintiff claims he wrote and mailed to the Home Office of the defendant, is sufficient in law to constitute "due proof" of disability within the meaning of Section 1 of New York Life Insurance Company policy No. 8611895.

4. Plaintiff was not on August 11, 1934 and has not since been totally and permanently disabled by bodily injury or disease so that he is prevented thereby from engaging in any occupation whatsoever for remuneration or profit within the meaning of New York Life Insurance Company policy No. 8611895, as those terms are used, defined, and limited in said policy.

5. Neither defendant nor any of its servants, agents, employees or representatives, is, as a matter of law, guilty of having committed any fraud upon the plaintiff herein in the manner, form or substance charged in the plaintiff's petition.

6. That as a matter of law, plaintiff is not entitled to the relief prayed for in his petition herein; that as a matter of law, defendant is entitled to have said petition dismissed with prejudice at the plaintiff's costs.

[fol. 60] 7. That as a matter of ...w, the defendant's motion to dismiss the plaintiff's petition made at the close of plaintiff's evidence should have been sustained."

Upon the facts found by the Court, and the conclusions of law stated by the Court, the defendant is entitled to a decree in its favor, and such a decree is made and entered. The defendant has submitted a form of decree which I will read. I have not yet read it. It would seem to be in proper form.

To the decree in favor of the defendant, the plaintiff is also allowed an exception.

(To the entering of a decree, requested by the defendant, the plaintiff by his counsel, at the time duly excepted and still excepts.)

[fol. 61] Exhibit "F".

(Petition.)

In the Circuit Court of Jackson County, Missouri, at Kansas City.

James Shay, Plaintiff,
No. 457059. vs.
New York Life Insurance Company, a corporation, Defendant.

Plaintiff states that he is now and was, at all times herein mentioned, a citizen and resident of the City of Washington, District of Columbia; that the defendant is now, and was at all times herein mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and is and was at all times mentioned herein duly authorized to do and was engaged in the life, health and accident insurance business in the State of Missouri; that the defendant at all times mentioned herein, and at the present time, maintains an office in Kansas City, Jackson County, Missouri, for the transaction of its usual business.

Plaintiff further states that on or about April 29, 1924, the defendant issued to one Samuel R. Toucey, its certain policy of insurance Numbered 8611895, wherein and whereby, for an annual premium of $2,182, it insured the life of the said Samuel R. Toucey in the sum of $50,000, and wherein and whereby it agreed to pay to the said Samuel R. Toucey the sum of $500 each month during the life time of the said Samuel R. Toucey, and also to waive the payment of premiums if the said Toucey should become wholly and presumably permanently disabled before attaining the age of sixty (60); that said policy is marked Exhibit "A" filed herewith, and made a part hereof.

Plaintiff further states that on or about the first day of April, 1933, and while said policy was in full force and ef-
[fol. 62] fect, the said Samuel R. Toucey became wholly

and presumably permanently disabled, and thereafter, and while said policy was in full force and effect, the said Samuel R. Toucey gave notice to the defendant that he was wholly and presumably permanently disabled; that all of such matters, facts and things occurred and took place before said Samuel R. Toucey had attained the age of sixty years.

Plaintiff further states that at all times mentioned herein the said Samuel R. Toucey had paid all premiums and charges due under the terms of said policy and said policy was in full force and effect, and that the said Samuel R. Toucey and this plaintiff have performed all the terms and conditions of said contract of insurance required of them to be performed.

Plaintiff further states that he is now the owner and holder of any and all claims arising out of said contract of insurance by virtue of the permanent disability of the said Samuel R. Toucey and that the said Samuel R. Toucey, prior to the institution of this suit, has assigned all of his right, title and interest in and to any and all claims and demands under said contract of insurance to this plaintiff.

Plaintiff further states that there is due and payable under the terms and conditions of said policy by reason of the permanent disability of the said Samuel R. Toucey, the sum of $28,000; that although due demand has been made on defendant for payment of said claim and demand, the defendant, without just cause or excuse, has failed and refused, and still fails and refuses to pay the said sum of $28,000 due under said policy, or any part thereof.

Plaintiff further states that defendants failure and refusal to pay under the terms and conditions of said policy was and is vexatious and without reasonable cause or excuse, and that by reason of the defendant's vexatious refusal to pay said loss and damage, this plaintiff has been compelled to employ attorneys to institute and prosecute this action; that a reasonable attorneys fee for the institution and prosecution of this action is $10,000.

[fol. 63] Wherefore, Plaintiff prays judgment against the defendant in the sum of $28,000, together with interest

thereon at the rate of 6% per annum; and in the further sum of $2,800 as and for penalty for the vexatious refusal to pay said claim and demand; and for the sum of $10,000 as and for a reasonable attorneys fee; and for costs.

CORNELIUS ROACH,
M. W. BORDERS, JR.,
Attorneys for Plaintiff.

[fol. 64] (Order Granting Samuel R. Toucey Leave to File Answer to Supplemental Bill in Equity.)

Now on this day the answer of plaintiff, Samuel R. Toucey, to the supplemental bill in equity of the New York Life Insurance Company being presented to the Court, with request for leave to file the same out of time,

It Is Ordered, That said answer may be filed this 11th day of May, 1938.

MERRILL E. OTIS,
Judge.

Filed in the United States District Court May 11, 1938.

[fol. 65] Plaintiff's Answer to Supplemental Bill in Equity of New York Life Insurance Company.

In the District Court of the United States for the Western Division of the Western District of Missouri.

April, 1938, Term.

Samuel R. Toucey, Plaintiff,
No. 2810. vs. In Equity.
New York Life Insurance Company, a corporation, Defendant.

Comes now Samuel R. Toucey, and for his answer to the supplemental bill in equity of the New York Life Insurance Company, alleges and states as follows:

1. Said Samuel R. Toucey admits that on or about the 26th day of October, 1935, he commenced an action in equity against the New York Life Insurance Company in the Circuit Court of Jackson County, Missouri; that Exhibit "A" attached to defendant's supplemental bill in

equity is a true copy of said petition containing therein all the allegations and averments thereof.

2. Said Samuel R. Toucey admits that pursuant to the filing of the aforesaid petition summons was duly issued and served on New York Life Insurance Company; that on the return date said New York Life Insurance Company removed said cause to the United States District Court for the Western District of Missouri; that thereafter and on February 21, 1936, said New York Life Insurance Com-[fol. 66] pany filed a motion to dismiss said cause; that said motion was overruled by the Court on the 13th day of March, 1936; that thereafter on April 23, 1936, New York Life Insurance Company filed its answer and motion to dismiss said cause and plaintiff admits that Exhibit "B" attached and made a part of the supplemental bill in equity of New York Life Insurance Company is a true copy thereof and contains all the allegations of said answer and motion to dismiss.

3. Said Samuel R. Toucey admits that on or about the 25th day of May, 1936, he filed a reply to defendant's answer and that a true copy of said reply is attached to defendant's supplemental bill and marked Exhibit "C".

4. Said Samuel R. Toucey admits that thereafter said cause came on for trial on the 18th day of November, 1936, before the Honorable Merrill E. Otis, District Judge, and that said Court rendered and entered a decree, a true copy of which is attached to defendant's supplemental bill as a part thereof and marked Exhibit "D".

5. Said Samuel R. Toucey admits that at the trial of said cause both said Toucey, as plaintiff, and New York Life Insurance Company, as defendant, offered testimony upon the issue whether said Toucey was totally and permanently disabled.

6. Said Samuel R. Toucey admits that at the close of the evidence in said cause, this Court delivered the opinion, copy of which is attached to defendant's supplemental bill, made a part thereof and marked Exhibit "E", but states that in said opinion the Court found as fact and declared as law that the plaintiff, Samuel R. Toucey did not ask pecuniary relief unless he be first granted the rein-

statement of the $50,000.00 policy, and that since the Court denied reinstatement its said ruling fully determined the case so that it was not necessary that the Court make a finding with reference to the issue of disability.

[fol. 67] Said Samuel R. Toucey further states that the Court in determining adversely to him the equitable issues upon which reinstatement was asked, thereupon lost jurisdiction of said cause and had no authority, power or jurisdiction to determine the legal issue as to disability and that its determination was and is in excess of the jurisdiction of said court void and without any legal effect whatsoever, and plaintiff specifically denies that said decree or the Court's opinion were or are final, conclusive or res judicata of any of the legal issues raised in the trial of said cause, and particularly the issue as to whether said Toucey was or had been totally and permanently disabled within the meaning of said policy.

7. Said Samuel R. Toucey admits that on December 28, 1937 one James Shay commenced an action in the Circuit Court of Jackson County, Missouri, at Kansas City, numbered 457,059, entitled James Shay, Plaintiff, vs. New York Life Insurance Company, a corporation, defendant, and that Exhibit "F", attached to and made a part of defendant's supplemental bill in equity is a true copy of said petition.

8. Said Samuel R. Toucey further states that prior to the institution of said suit he did assign all of his right, title and interest in and to any and all claims and demands under policy of insurance No. 8611895, issued by the New York Life Insurance Company to said James Shay; that said assignment was made upon a consideration valid in law and for a lawful and proper purpose and said Samuel R. Toucey denies that said assignment was made by him without consideration; denies that said assignment is colorable and a sham and pretext to evade the jurisdiction and decree of this Court; denies that said assignment is a fraud upon this court; denies that said assignment was made to defeat the decree and adjudication of this court or in defiance and violation thereof; denies that said assignment is the result of a collusive and fraudulent plan between said Toucey and said Shay; denies that said as-

[fol. 68] signment is for the purpose and with the object of nullifying the decree of this Court by securing a re-adjudication of issues presented and adjudged herein and states that said suit filed by said James Shay on the cause of action assigned to him by plaintiff was and is a cause of action at law, and that the issues involved in said suit have never been lawfully adjudicated by this or any other Court, and states that the adjudication of this Court upon the hearing heretofore had herein was and is res judicata only as to the equitable issues upon which reinstatement was sought and was and is not res judicata upon the legal issue of disability involved in said suit now pending before the Circuit Court of Jackson County, Missouri.

9. Said Samuel R. Toucey denies that defendant has no adequate remedy at law and alleges and states that if the decision and decree of this court heretofore rendered herein is res judicata of the issues involved in the suit now pending in the Circuit Court of Jackson County, Missouri, then said New York Life Insurance Company has a full, complete and adequate remedy at law by appearing therein and pleading the facts upon which it is claimed the judgment of this Court is res judicata of the issues there involved.

10. Said Samuel R. Toucey further states that the supplemental bill in equity of New York Life Insurance Company is wholly without equity, that said so-called supplemental bill is not supplemental to any bill heretofore at any time filed in behalf of the New York Life Insurance Company, and the relief sought therein is not supplemental to any decree or relief heretofore granted the New York Life Insurance Company in the above entitled suit; that the New York Life Insurance Company has a plain, adequate and complete remedy at law and said supplemental bill in equity is in violation of the provisions of Section 384 of Title 28 of the United States Code, wherein it is provided that suits in equity shall not be sustained in [fol. 69] any court of the United States in any case where a plain, adequate and complete remedy may be had at law.

11. Said Samuel R. Toucey further states that the supplemental bill in equity of New York Life Insurance Company seeks to stay proceedings in the Circuit Court of Jackson County, Missouri, in violation of the provisions of

Section 379 of Title 28 of the United States Code, wherein it is provided that the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.

12. Said Samuel R. Toucey further states that the supplemental bill in equity was and is defective for want of parties defendant in that it appears from the face thereof that James Shay is not a party defendant, although the relief sought is the stay of a suit brought by him in the Circuit Court of Jackson County, Missouri.

13. Further answering, said Samuel R. Toucey denies each and every other allegation of fact contained in said supplemental bill in equity, not heretofore expressly admitted or directly controverted by the allegations of this answer.

Wherefore, Said Samuel R. Toucey, having fully answered, prays that said supplemental bill in equity be dismissed and that he be discharged with his costs herein.

M. W. BORDERS, JR.,
CORNELIUS ROACH,
WILFRED WIMMELL,
Solicitors for Plaintiff,
Samuel R. Toucey.

[fol. 70] State of Missouri,
County of Jackson—ss.:

Wilfred Wimmell, being duly sworn on his oath, states:

That he is one of the Solicitors for Samuel R. Toucey, and states that the matters and facts set forth in the above and foregoing answer are true and correct, as he verily believes.

WILFRED WIMMELL.

Subscribed and sworn to before me this 10th day of May, 1938.

BLANCHE I. LEE,
(Notarial Seal) Notary Public.

My commission expires November 15, 1938.

Filed in the United States District Court May 11, 1938.

[fol. 71] Stipulation Respecting Testimony of James Shay.

It is hereby stipulated and agreed by and between the parties hereto that James Shay, if produced, sworn and examined as a witness in the above entitled cause, will testify as follows:

1. My name is James Shay.

2. I am now a resident of Washington, D. C., and have resided in Washington, D. C., for ten years.

3. My present residence address is McReynolds Apartments, Washington, D. C.

4. I am now engaged, and for several years have engaged in, public relations work, and maintain an office at Press Building, Washington, D. C.

5. I have been acquainted with M. W. Borders, Jr., an attorney of Kansas City, Missouri, for six or seven years.

6. I have never met and am not acquainted with Major Samuel R. Toucey of Kansas City, Missouri.

7. On or about December 10, 1937, I was requested by M. W. Borders, Jr., to accept an assignment from Major Samuel R. Toucey of a claim or cause of action for disability benefits claimed by Major Toucey to have accrued to him under Policy No. 8611895 issued by the New York Life Insurance Company. A copy of that assignment is attached hereto and made a part hereof and marked Exhibit "A".

[fol. 72] 8. I have no information nor knowledge as to the nature or character of the claim, excepting such general facts as were imparted to me by Mr. M. W. Borders, Jr.

9. I accepted the assignment of the claim or cause of action and employed Mr. M. W. Borders, Jr., and Mr. Cornelius Roach of Kansas City, Missouri, as my attorneys to prosecute such claim or cause of action.

10. In event a recovery is had in the matter referred to, I will account for such proceeds to Major Toucey after deduction of all costs and expenses and the attorneys' fees

of the firm of Borders, Borders and Warrick of Kansas City, Missouri, of which M. W. Borders, Jr., is a member.

11. I gave Major Toucey no cash or other thing of value for the assignment, except such as said assignment shows.

12. I accepted the assignment of the cause of action as an accommodation to Mr. M. W. Borders, Jr., it being my understanding that the legal title to the cause of action being in my name and the suit being prosecuted in my name, and my being a resident of the District of Columbia, there would be no diversity of citizenship as between me and the New York Life Insurance Company within the meaning of the statutes relating to the removal of causes of action.

13. I have made no agreement to pay the costs in this action, but all costs and expenses will be deducted from any recovery before remittance to Major Toucey. Such costs as were advanced upon the filing of the case of James Shay, Plaintiff, vs. New York Life Insurance Company, Defendant, now pending in the Jackson County Circuit Court at Kansas City and numbered 457059, in which I am plaintiff, were not advanced by me, nor did I supply the facts set forth in the allegations of the petition in said case.

14. I have no express agreement with anyone that I shall receive a fee in connection with said assignment or in connection with any litigation relating to said New York [fol. 73] Life Insurance Company policy No. 8611895.

15. I have agreed to pay an attorneys' fee in connection with the claim made on New York Life Insurance Company policy No. 8611895 to the extent that if Messrs. Borders & Roach are successful in collecting any sum on said policy by suit or otherwise I am obligated to distribute a certain portion of said sum to Messrs. Borders & Roach and turn over the balance to Major Samuel R. Toucey.

It is further hereby agreed and stipulated by and between the parties hereto that this stipulation may be offered in evidence by either party at the trial of this cause, together with Exhibit "A" thereto attached, in lieu of the

actual testimony of said James Shay, with the same force and effect as though said James Shay had appeared and testified at the trial in person or by deposition, subject only to the right of either party to object to the competency, relevancy and materiality of the facts set forth in this stipulation.

M. W. BORDERS, JR.,
CORNELIUS ROACH,
WILFRED WIMMELL,
Solicitors for Plaintiff.

GEO. J. MERSEREAU,
RICHARD S. RIGHTER,
HORACE F. BLACKWELL, JR.,
Solicitors for Defendant.

Filed in the United States District Court July 5, 1939.

[fol. 74] Exhibit "A".

Assignment Agreement.

This Agreement, Made and entered into this fifteenth day of December, 1937, at Kansas City, Jackson County, Missouri, by and between Samuel R. Toucey, of Kansas City, Jackson County, Missouri, party of the first part, and James Shay, of the City of Washington, District of Columbia, party of the second part; Witnesseth:

Whereas, New York Life Insurance Company, a corporation, executed and delivered its policy No. 8611895, wherein it agreed to pay Samuel R. Toucey Five Hundred ($500.00) Dollars each month during the life time of the said Samuel R. Toucey, and also to waive the payment of premiums on said policy, if the insured became wholly and presumably permanently disabled before age sixty (60), and the said Samuel R. Toucey did, on or about April 1, 1933, become wholly and presumably permanently disabled before attaining the age of sixty (60), and while said contract of insurance was in full force and effect, and the said New York Life Insurance Company became indebted to Samuel R. Toucey by reason thereof.

Now, Therefore, The said Samuel R. Toucey hereby transfers, assigns and sets over unto the said James Shay, any and all claims, demands and choses in action against the said New York Life Insurance Company arising by virtue of said contract of insurance by reason of the disability of the said Samuel R. Toucey.

In Consideration Whereof, The said James Shay hereby agrees to exercise reasonable care and diligence to enforce said claims, demands or rights of action and, after deducting all costs and expenses in so doing, to hold the proceeds or amounts in trust for the use and benefit of the said Samuel R. Toucey. It is the intention of the parties hereto that the said James Shay shall have the full and complete legal and equitable title to the above claims and choses in action, and that he shall be a trustee of the express trust [fol. 75] herein set forth and created in accordance with the laws of the State of Missouri.

In Witness Whereof, The parties hereto have hereunto set their hands and seals this fifteenth day of December, 1937.

(Signed) SAMUEL R. TOUCEY,
First Party.

(Signed) JAMES SHAY,
Second Party.

I, James Shay, assignee and trustee of the claims of Samuel R. Toucey against the New York Life Insurance Company arising out of the contract of insurance and disability of the said Samuel R. Toucey above described, hereby appoint, retain and authorize Cornelius Roach and M. W. Borders, Jr., both of Kansas City, Missouri, attorneys at law, as my attorneys to institute and prosecute any and all necessary suits to enforce and collect said claims, and I further auhtorize Cornelius Roach, my attorney, to retain such additional counsel as in his opinion may be advisable to assist in the prosecution of said claims.

Dated this fifteenth day of December, 1937.

(Signed) JAMES SHAY.

[fol. 76] (Final Decree and Order for Permanent Injunction.)

The above entitled cause having come on to be heard before the Court on defendant's verified supplemental bill in equity herein and the answer of plaintiff, Samuel R. Toucey to said supplemental bill, and the defendant having appeared by its solicitors, Messrs. Richard S. Righter and Horace F. Blackwell, Jr., and plaintiff having appeared by his solicitor, Mr. Cornelius Roach, Jr., and the Court having heard the evidence and the argument of counsel, the Court finds the issues in favor of defendant and against the plaintiff and finds that defendant is entitled to the relief prayed for in its said supplemental bill in equity herein.

Now, Therefore, it is hereby Ordered, Adjudged and Decreed as follows:

1. That the purported rights attempted to be asserted by James Shay in the case of James Shay, Plaintiff, vs. New York Life Insurance Company, Defendant, in the Circuit Court of Jackson County, Missouri, numbered 457,059 in said Court, were fully and finally determined and adjudicated by this Court in the final decree in this case entered on the 22nd day of November, 1936; that said decree is res adjudicata of all rights attempted to be asserted by said Shay in said suit in said Circuit Court;

2. That Samuel R. Toucey and his said attorneys, Cornelius Roach, Jr. and M. W. Borders, Jr., forthwith physically surrender to the Marshal of this Court New York Life Insurance Company Policy No. 8,611,895 and that said Marshal totally destroy said policy and report the fact in writing to the Clerk of this Court when he has complied with this order;

3. That the order for a preliminary injunction and the preliminary writ of injunction heretofore issued out of and under the seal of this Court be and the same are hereby made permanent, and that a permanent writ of injunction upon the same terms and conditions as said preliminary writ of injunction forthwith issue out of and under [fol. 77] the seal of this Court;

4. That defendant herein have its costs herein incurred and expended.

MERRILL E. OTIS,
Judge.

Entered this 14 day of August, 1939.

Filed in the United States District Court Aug. 14, 1939.

(Permanent Writ of Injunction with Marshal's Return.)

The United States of America,
Western District of Missouri.—ss.:

The President of the United States of America,

To Samuel R. Toucey and His Agents, Servants, Employees and Assigns, Including James Shay, and the Attorneys of Said Samuel R. Toucey and Said James Shay and Those in Active Concert or Participating With Them,—Greeting:

Whereas, New York Life Insurance Company, a corporation, a citizen and resident of the State of New York, has heretofore duly filed in the above entitled cause its supplemental bill in equity, seeking, among other things, an injunction against the above persons, and a preliminary writ of injunction heretofore issued out of and under the seal of this Court against them pursuant to an order for such injunction duly made and entered herein; and

Whereas, upon a final hearing on the merits of said cause, the Court has duly ordered a permanent writ of injunction to issue out of and under the seal of this Court upon the same terms as those contained in said preliminary writ of injunction;

Now, Therefore, we, having regard to the matters in said supplemental bill contained and the order of the Court for a permanent writ of injunction herein, do hereby permanently strictly enjoin and restrain you the said Samuel R. [fol. 78] Toucey, and your agents, servants, employees and assigns, including the aforesaid James Shay, and you, the attorneys of said Samuel R. Toucey, and you in active con-

cert or participating with them, and each of you, either in the name of said Toucey or in the name of said Shay, or in the name of any other person, from bringing or further prosecuting any suit or suits, action or proceeding, of any kind or character in any court or tribunal whatsoever, or committing any other act of any description for the purpose, or having the effect, of seeking, inducing or causing a retrial, reconsideration or readjudication of the issues adjudged by this Court in its decree issued herein November 22, 1936, and from prosecuting or proceeding in any manner whatsoever in, or attempting to prosecute or proceed in, the suit and action entitled James Shay, Plaintiff, vs. New York Life Insurance Company, a corporation, Defendant, Number 457059, now pending in the Circuit Court of Jackson County, Missouri, at Kansas City, which commands and enjoins you and each of you are respectively required to observe and obey.

Hereof fail not under penalty of the law thence ensuing.

(Seal) A. L. ARNOLD,
District Court.

Dated this 14th day of August, 1939 at Kansas City, Missouri.

United States of America,
Western Division of the
Western District of Missouri.

I hereby certify I received this writ, August 14, 1939 and executed the within Writ, by delivering a copy of said Writ of Injunction and copy of the attached Final Decree, to Samuel R. Toucey, at his residence 131 W. 61 St Terrace, Kansas City, Mo., and making demand upon said Toucey for [surrended] policy =861895, (New York Life Insurance Company Policy).

I further executed the within Writ by delivering a copy of said permanent Writ of Injunction and a copy of the attached Final Decree to Cornelius Roach, Jr., one of the attorneys for said Toucey at the office of Cornelius Roach, [fol. 79] Jr., at 1014 National Fidelity Building, 10 and Walnut Street, Kansas City, Mo.

Said Toucey stated he could not deliver said policy to me because it is in the possession of said Roach. Said Roach refused to deliver said policy to me.

All done in Jackson Co. on this 15th day of August, 1939.

M. F.	4.00	H. L. DILLINGHAM,
Dept. Ex.	.48	By J. W. Murphy.
	$4.48	

Filed in the United States District Court Aug. 24, 1939.

(Notice of Appeal.)

Notice is hereby given that Samuel R. Toucey, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Eighth Circuit from the final decree and order for permanent injunction entered in this action on August 14, 1939.

CORNELIUS ROACH,
Attorney for Appellant,
1002 Walnut,
Kansas City, Mo.

Copy of above Notice of Appeal mailed to Lathrop, Crane, Reynolds, Sawyer & Mersereau, Attorneys for the defendant, November 9th, 1939.

E. O'KEEFE,
Deputy Clerk.

Filed in the United States District Court Nov. 9, 1939.

[fol. 80] (Cost Bond on Appeal.)

Know All Men By These Presents, That we, Samuel R. Toucey, as principal, and Continental Casualty Company, as surety, are held and firmly bound unto the New York Life Insurance Company, a corporation, in the full and just sum of Two Hundred Fifty ($250) Dollars to be paid to the said New York Life Insurance Company, its attorneys, successors or assigns to which payment well and

truly to be made, we bind ourselves, our successors and assigns jointly and severally by these presents.

The condition of the above obligation is that whereas in a proceeding in the above entitled cause between Samuel R. Toucey, plaintiff, and the New York Life Insurance Company, a corporation, defendant, a final decree and order was issued granting said New York Life Insurance Company a permanent injunction against said Samuel R. Toucey and the said Samuel R. Toucey having filed his notice of appeal to the United States Circuit Court of Appeals for the Eighth Circuit to reverse the said decree and order in said suit.

Now Therefore, if the said Samuel R. Toucey shall prosecute his said appeal to effect and answer all costs, if he shall fail to sustain his appeal, then the above obligation to be void; otherwise to remain in full force and effect.

Witness our hands and seals this 25th day of October, 1939.

S. R. TOUCEY, (Seal)
Principal.

CONTINENTAL CASUALTY
COMPANY, (Seal)
By Roger A. Durkee,
Surety.
Attorney-in-fact.

Filed in the United States District Court Nov. 9, 1939.

[fol. 81] (Order Extending Time to File Transcript.)

December 15, 1939.

Now on this day the application of the appellant, Samuel R. Toucey, for an order extending the time to file transcript of the record and for docketing of his appeal in this case, being presented to the Court, and the Court having duly considered said application, Now, Therefore, for good cause shown, it is hereby Ordered that the time for filing transcript of the record in this cause and for docketing the appeal of Samuel R. Toucey in the United States Circuit

Court of Appeals for the Eighth Circuit is hereby enlarged and extended to on or before January 18, 1940.

Dated at Kansas City, Missouri, this 15 day of December, 1939.

MERRILL E. OTIS,
United States District Judge.

Filed in the United States District Court Dec. 15, 1939.

[fol. 82] Statement of Points to be Relied Upon.

Comes now Samuel R. Toucey, plaintiff in the above entitled cause, and files the following statement of points upon which he will rely in the prosecution of the appeal in said cause from the final decree and order of this court entered on the 14th day of August, 1939, granting a permanent writ of injunction.

1. The court erred in entering judgment for the defendant, New York Life Insurance Company, upon the so called supplemental bill in equity for the following reasons:

(a) It appears from the face of the so called supplemental bill that the court lost all jurisdiction of the case at the time the court determined adversely to Toucey the equitable issues upon which the suit was founded and the court had then no jurisdiction to determine the dependent legal issues in said equity suit or to entertain the so called supplemental bill in equity under which the injunction was issued.

(b) It appears from the face of the so called supplemental bill that the determination of the legal issue of disability was unnecessary to a final determination of the equity suit brought by Toucey.

(c) The so called supplemental bill fails to state facts sufficient to constitute a cause of action for injunctive relief.

(d) It appears upon the face of the so called supplemental bill that it is wholly without equity.

(e) The injunction was improvidently granted.

2. The court erred in entering judgment for defend-
[fol. 83] ant, New York Life Insurance Company upon the

so called supplemental bill in equity for the following reasons:

(a) The injunction stays proceedings in the Circuit Court of Jackson County, Missouri in violation of the provision of Section 379 of Title 28 of the United States Code.

Wherefore, Plaintiff prays that said final decree and order be reversed and for such other and further relief as to the court may seem just and proper.

CORNELIUS ROACH,
Attorney for Plaintiff,
Samuel R. Toucey.

Service of the above Statement of Points accepted and acknowledged this 27th day of December, 1939.

GEORGE J. MERSEREAU,
RICHARD S. RIGHTER,
HORACE F. BLACKWELL, JR.,
Attorneys for Defendant.

Filed in the United States District Court Dec. 27, 1939.

[fol. 84] (Designation of Matters to be Included in Record on Appeal.)

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Eighth Circuit pursuant to an appeal in the above entitled cause and to include in such transcript of record the following and no other papers and exhibits, to-wit:

1. Application of New York Life Insurance Company for leave to file supplemental bill in equity, filed March 10, 1938.

2. Order granting New York Life Insurance Company leave to file supplemental bill, dated March 10, 1938.

3. Supplemental bill in equity of New York Life Insurance Company, filed March 10, 1938.

4. Order granting leave to plaintiff to file answer to supplemental bill of New York Life Insurance Company, dated May 11, 1938.

5. Plaintiff's answer to supplemental bill, filed May 11, 1938.

6. Stipulation respecting testimony of James Shay, filed July 5, 1939.

7. Final decree and order for permanent injunction, dated August 14, 1939.

8. Permanent writ of injunction, dated August 14, 1939, with return of marshall thereon, dated August 24, 1939.

9. Plaintiff's notice of appeal, filed November 9, 1939.

[fol. 85] 10. Cost bond of plaintiff, filed November 9, 1939.

11. Plaintiff's statement of points, filed herewith.

12. This designation of parts of the record with admission of service thereon.

13. Order extending time to file transcript and to docket appeal dated December 15, 1939.

14. Clerk's certificate.

Said transcript of record to be prepared and filed as required by law and the rules of this court and of the United States Circuit Court of Appeals for the Eighth Circuit and to be filed in the office of the clerk of the United States Circuit Court of Appeals at St. Louis, Missouri.

CORNELIUS ROACH,
Attorney for Appellant,
1002 Walnut,
Kansas City, Mo.

Service of the above Designation acknowledged this 27th day of December, 1939.

GEORGE J. MERSEREAU,
RICHARD S. RIGHTER,
HORACE F. BLACKWELL, JR.,
Attorneys for Appellee.

Filed in the United States District Court Dec. 27, 1939.

[fol. 86] (Order Further Extending Time to File Transcript.)

January 18, 1940.

Now on this day the application of appellant, Samuel R. Toucey, for an order extending the time to file transcript of the record and for docketing of his appeal in this case, being presented to the Court, and the Court having duly considered said application, Now, Therefore, for good cause shown, it is hereby Ordered that the time for filing transcript of the record in this cause and for docketing the appeal of Samuel R. Toucey in the United States Circuit Court of Appeals for the Eighth Circuit is hereby enlarged and extended to on or before February 7, 1940.

Dated at Kansas City, Missouri this 18 day of January, 1940.

MERRILL E. OTIS,
United States District Judge.

Filed in the United States District Court Jan. 18, 1940.

[fol. 87] (Clerk's Certificate to Transcript.)

United States of America,—Set.:

I, A. L. Arnold, Clerk of the District Court of the United States for the Western District of Missouri, do hereby certify that the foregoing is a full, true and complete transcript of the record and proceedings, as called for in the Designation filed herein and made a part hereof, in the cause [wherin] Samuel R. Toucey is Plaintiff and New York Life Insurance Company, a corporation is Defendant, as fully as the same appears on file and of record in my office.

Seal
U. S. Dist. Court
West. Div.
West. Dist.
of Mo.

Witness my hand as clerk and the seal of said court. Done at office in Kansas City, Missouri, this 3rd day of February, A. D. 1940.

A. L. ARNOLD, Clerk,
U. S. District Court,
By H. C. Spaulding,
Deputy Clerk.

Filed Feb. 7, 1940. E. E. Koch, Clerk.

[fol. 73] [Appearances of counsel omitted in printing]

[fol. 74] [Notice of Hearing of Motion of Appellee for Affirmance of Decree, etc., filed April 22, 1940, omitted in printing]

[fol. 75] In United States Circuit Court of Appeals, Eighth Circuit

Motion of Appellee for Affirmance of Decree and Order for Permanent Injunction, etc.—Filed April 22, 1940

Now comes New York Life Insurance Company, appellee in the above entitled cause and prays the Court to affirm the final decree and order for permanent injunction rendered and entered herein by the District Court of the United States for the Western Division of the Western District of Missouri on August 14, 1939 (page 64 of the printed record now on file herein), without hearing oral argument upon the merits of this appeal, upon the ground and for the reason that appellant's statement of points to be relied upon in his brief on this appeal and his statement of points to be argued together with the cases therein cited are identical with the "Assignments of Error Intended to be Urged" and the "Points to be Argued" set forth in appellant's brief in cause No. 11,228 in this Court, being an appeal from a preliminary injunction issued herein by said District Court, and for the reason that all of said issues were fully considered by this Court and ruled by it in favor of this appellee on said first appeal, the opinion upon said first appeal being set forth in the case of Toucey v. New York Life Insurance Company, 102 F. (2d) 16, said opinion having been handed down on February 24, 1939, a rehearing therein denied on March 16, 1939 and the Supreme Court of the United States having denied a writ of certiorari therein on May 29, 1939 (307 U. S. 638), and for the reason that the appeal herein is frivolous.

Richard S. Righter, Horace F. Blackwell, Jr., Attorneys for Appellee, 1900 Fidelity Bldg., Kansas City, Missouri; Louis H. Cooke, 51 Madison Avenue, New York City, New York; Lathrop, Crane, [fol. 76] Reynolds, Sawyer & Mersereau, 1900 Fidelity Bldg., Kansas City, Missouri, of Counsel.

SUGGESTIONS IN SUPPORT OF MOTION FOR AFFIRMANCE OF DECREE AND ORDER FOR PERMANENT INJUNCTION BELOW WITHOUT ARGUMENT

I

On the first appeal of this case from the preliminary injunction issued by the trial court, the first point argued by Mr. Toucey's counsel was this (cause No. 11228, brief page 9):

"When the trial court in the equity case determined the equitable issues adversely to Toucey it lost jurisdiction to determine the dependent legal issue of disability and that issue is not *res judicata.*"

On the present appeal, which is from the final decree making permanent the preliminary injunction, the first point argued in the brief of Mr. Toucey's counsel is as follows (brief page 8):

"When the trial court in the original equity case determined the equitable issues adversely to Mr. Toucey, it lost jurisdiction to determine the dependent legal issue of disability and that issue is not *res adjudicata.*"

It will be observed that the wording of the points in the two briefs are identical except that the word "original" appears in the point in the second appeal and not on the first. This question was considered with great care in a [fol. 77] scholarly opinion by Judge Woodrough, in which he ruled as follows (102 F. (2d) l. c. 20):

"Insofar as Mr. Toucey's prayer for recovery for his disability payments may be regarded as a dependent legal claim, it was a claim dependent upon Mr. Toucey's establishing his right to reinstatement of his entire policy. That right in turn was dependent upon proving the disability occasioning premium waiver and aiso upon the alleged fraud of the insurance company in respect to said disability. Unless and until the equity court had before it evidence to justify it in finding both the disability and the fraud relating thereto, it could not award judgment on the disability provisions of the policy. But both of those claims were asserted and in controversy before it and the court of equity was called upon to decide upon both controversies. It did

consider the evidence on both issues and we are cited to no case implying that a court of equity lacks power to fully and finally adjudicate all equitable controversies presented by the pleadings and the evidence in a case within its jurisdiction. Its adjudication on each claim in controversy was equally conclusive and binding upon Mr. Toucey."

It will also be found that the cases cited by appellant in support of the proposition urged here are the same as those cited in his first brief. A few additional cases will be found cited, but those cases do not bear upon any question in controversy before the Court. They merely rule what appellee has never disputed, that a suit in equity may be maintained for the reinstatement of an insurance policy wrongfully cancelled (brief page 12).

[fol. 78] Appellant, in effect, concedes that the same issues are now before the Court which were adjudicated on the previous appeal. He says (brief page 10), "The Matter is again brought before this court on appeal from the final decree because of a sincere belief an improper result has been reached and a grave injustice done." Appellant, however, has advanced no new ground to sustain this claim. His reasons and his authorities are the same.

II

The second and last ground advanced by appellant on the appeal from the preliminary injunction (No. 11,228, brief page 9) is as follows:

"The equity suit and the action in the state court on the policy bring actions *in personam*, the federal court is prohibited by the provisions of Section 379 of Title 28 of the United States Code from staying the proceedings in the state court."

The second and last ground advanced by appellant on the present appeal from the final decree is as follows (brief page 9):

"The equity suit and the action at law on the policy are both actions *in personam* and the federal court is prohibited by the provisions of Section 379, Title 28, United States Code Annotated, from staying the proceedings in the state court."

It will be observed that again the points relied on are identical. It will also be found that the cases relied upon are exactly the same, except that fewer cases are cited on the second appeal than on the first.

This point was also disposed of by this Court's original [fol. 79] opinion after most careful consideration, the Court holding that the trial court clearly had jurisdiction in an ancillary proceeding such as this to protect its own decree against a subsequent state court suit by injunction, the effect of which would be to nullify that decree by permitting a relitigation of the same issue already tried by the federal court in the original case. This Court held that such injunction in this case was necessary to give protection to the original decree (see 102 F. (2d) l. c. 21, 22, 23).

It is not necessary to analyze the two briefs for the purpose of demonstrating their similarity. They are not similar. They are identical. It seems to us, and we respectfully submit, that as exactly the same issues were fully briefed, argued and determined by this Court, a rehearing denied and certiorari denied, it is not in the interests of justice to require this appellee to incur the expense involved in a re-presentation of exactly the same questions disposed of before. It may be said parenthetically that appellant's answer below (R. 55) does not deny the principal allegations of fact in appellee's supplemental bill (R. 13). The only evidence introduced at the trial was a stipulation (R. 60) setting forth the testimony of assignee Shay. The sufficiency of this stipulation and of the bill to support the final decree is not challenged, except upon the grounds urged upon the first appeal, the grounds already disposed of by this court's original opinion.

In Chicago, St. P., M. & O. Ry. Co. v. Kulp, 102 F. (2d) 352, this Court, by Judge Van Valkenburgh, said, l. c. 354:

"This court has repeatedly held that the decision on former appeal is the 'law of the case' on a question presented [fol. 80] in that former appeal, unless the evidence introduced at the subsequent trial is substantially different from that considered on the first appeal, and must be followed in all subsequent proceedings in such case in both district and appellate courts, unless that decision is clearly erroneous and works manifest injustice. The introduction of new testimony at the second trial which is merely cumulative will not prevent the application of this doctrine on the

second appeal. While this rule of practice is not a limit of power, it is nevertheless a salutary one, and should be departed from only after careful consideration on situations arising in specific cases. The following cases announce the principles declared by this court: Pennsylvania Mining Co. v. United Mine Workers of America et al., 8 Cir., 28 F. 2d 851; Ætna Life Insurance Co. v. Wharton, 8 Cir., 63 F. 2d 378; Zurich General Accident & Liability Insurance Co., Ltd. v. O'Keefe, 8 Cir., 64 F. 2d 768; American Surety Company v. Bankers' Savings & Loan Ass'n of Omaha, Nebr., 8 Cir., 67 F. 2d 803, 804; Claiborne-Reno Co. v. E. I. Du Pont De Nemours & Co., 8 Cir., 77 F. 2d 565; New York Life Insurance Co. v. Golightly, 8 Cir., 94 F. 2d 316; Marion Steam Shovel Co. v. Bertino et al., 8 Cir., 82 F. 2d 541."

This rule applies equally where the first appeal was from the preliminary injunction (Brown v. Lanyon Zinc Co., 8 Cir., 179 F. 309; International Brotherhood v. Western Union Telegraph Co., 7 Cir., 46 F. 2d 736).

It is respectfully submitted that the motion should be sustained.

Richard S. Righter, Horace F. Blackwell, Jr., Attorneys for Appellee, 1900 Fidelity Bldg., Kansas City, Missouri.

[fol. 81] Louis H. Cooke, 51 Madison Avenue, New York City, New York; Lathrop, Crane, Reynolds, Sawyer & Mersereau, 1900 Fidelity Bldg., Kansas City, Missouri, of Counsel.

[File endorsement omitted.]

[fol. 82] In United States Circuit Court of Appeals, Eighth Circuit

Order Denying Motion of Appellee for Affirmance of Decree and Order for Permanent Injunction—April 22, 1940

This matter comes before the Court on the motion of appellee for affirmance of decree and order for permanent injunction, Mr. Richard S. Righter appearing in support

of the motion, and Mr. Cornelius Roach appearing in opposition thereto, and the Court being advised,

It is Ordered that such motion be and is hereby denied.

[fol. 83] (Order of Submission, May 17, 1940, omitted in printing.)

[fol. 84] In United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1940

No. 11,686

Samuel R. Toucey, Appellant,

vs.

New York Life Insurance Company, a Corporation, Appellee

Appeal from the District Court of the United States for the Western District of Missouri

Mr. Cornelius Roach for Appellant.

Mr. Richard S. Righter (Mr. Horace F. Blackwell, Jr., Mr. Louis H. Cooke and Messrs. Lathrop, Crane, Reynolds, Sawyer & Mersereau were with him on the brief) for Appellee.

Before Gardner, Sanborn, and Woodrough, Circuit Judges

Opinion—June 29, 1940

Sanborn, Circuit Judge, delivered the opinion of the Court:

From a final decree permanently enjoining Samuel R. Toucey from relitigating in his own name or in the name of any other person the issues determined by the court below in this cause and from attempting to prosecute or [fol. 85] proceed further in a suit pending in the Circuit Court of Jackson County, Missouri, entitled, "James Shay, Plaintiff, vs. New York Life Insurance Company, a corporation, Defendant," he has appealed.

Briefly stated, the facts are as follows: On January 2, 1924, the New York Life Insurance Company issued to

Samuel R. Toucey a $50,000 policy of life insurance, which contained a provision that $500 a month would be paid him if prior to age sixty he became totally and permanently disabled. On September 26, 1934, the policy was surrendered by the insured and was reduced so that the death benefit was $25,000, with corresponding reductions of other indemnities and in future premiums. On October 26, 1935, the insured commenced this suit in the Circuit Court of Jackson County, Missouri, to set aside the reduction of the policy and to procure its reinstatement as originally written. In his bill of complaint he alleged that in April, 1933, he became totally and permanently disabled within the meaning of the policy and was entitled to the $500 monthly disability benefits from and after that time; that he was then not advised of his rights under the policy, and that in 1934 he was fraudulently induced by the Insurance Company to accept the reduction of the policy. The prayer of his bill was for a reinstatement of the policy as originally written, and an award of the disability benefits provided for. The Company removed the suit to the court below. In its answer it denied that the insured became disabled as he alleged and denied that the reduction of the policy was induced by fraud. The issues were tried, and the court below found no fraud and no total and permanent disability of the insured, and entered a decree dismissing the insured's bill upon the merits. This decree became final. Thereafter the insured made a formal assignment of his policy and his claims thereunder to James Shay, a resident of the District of Columbia, who commenced a suit in the Circuit Court of Jackson County, Missouri, to recover the $500 monthly benefits provided for by the policy as originally [fol. 86] written, upon the ground that the insured had become totally and permanently disabled in April, 1933. The Insurance Company, with leave of court, filed its supplemental bill in the suit at bar, in which it set up the proceedings had in the court below and the attempt of the insured to have the issue of his claimed total and permanent disability relitigated in the Circuit Court of Jackson County, notwithstanding the decree of the federal court. The Company prayed for an injunction, both temporary and permanent, against any further prosecution by the insured of his claimed right of recovery which had been adjudicated. The insured answered and asserted, among other things, that the decree dismissing his bill of complaint was not res

judicata of the issue of his total and permanent disability. The court ruled that the decree of dismissal was res judicata of all the issues in the case, and granted a preliminary injunction. The insured appealed, and this Court affirmed. (Toucey v. New York Life Insurance Co., 102 F. 2d 16.) He applied to the Supreme Court for certiorari, and his application was denied. (307 U. S. 638.) The case was remanded, and thereafter the decree now appealed from was entered, the effect of which was to make the preliminary injunction theretofore granted permanent.

The final decree has the same basis in fact and law as the interlocutory decree which was considered on the former appeal. We are asked to overrule our previous decision. In his brief the appellant says: "The matter is again brought before this court on appeal from the final decree because of a sincere belief an improper result has been reached and a grave injustice done." His argument and brief present the same grounds for reversal that were urged on the former appeal.

A decision of an appellate court is, as to the legal issues considered and determined, the law of the case in any subsequent proceedings in either the trial or the appellate court, and is to be followed except where the evidence is sub- [fol. 87] stantially different, or where, between the date of the decision and the time of the reconsideration of the case, controlling authority has determined the legal issues adversely, or where it appears that the decision was clearly erroneous and that adherence to it will work a manifest injustice. Millers' Mut. Fire Ins. Ass'n of Illinois v. Bell, Judge, 8 Cir., 99 F. 2d 289, 292 nd cases cited: Chicago, St. Paul, M. & O. Ry. Co. v. Kulp, 8 Cir., 102 F. 2d 353, 354 and cases cited.

There has been no change in the evidence in this case and no change in the controlling authorities since our previous decision. It is therefore apparent that the only possible basis for overruling that decision and for reversing the decree appealed from would be that the decision on the former appeal was clearly erroneous and that adherence to it would work a manifest injustice. We are convinced that the former decision of this Court in this case was right, for the reasons therein stated. (Compare Hesselberg v. Aetna Life Ins. Co., 8 Cir., 102 F. 2d 23, 27.)

The decree appealed from is affirmed.

[fol. 88] In United States Circuit Court of Appeals, Eighth Circuit

No. 11,686

Samuel R. Toucey, Appellant,

vs.

New York Life Insurance Company, a Corporation

Appeal from the District Court of the United States for the Western District of Missouri

Decree—June 29, 1940

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court, in this cause be, and the same is hereby, affirmed with costs; and that the New York Life Insurance Company, a corporation, have and recover against Samuel R. Toucey the sum of Twenty Dollars for its costs herein and have execution therefor.

[fol. 89] In United States Circuit Court of Appeals, Eighth Circuit

[Title omitted]

Appellant's Petition for Rehearing—Filed July 15, 1940

Comes now Samuel R. Toucey, appellant herein, and respectfully petitions the court to grant him a rehearing in this cause.

The court has affirmed the final decree entered by the District Court permanently enjoining appellant from prosecuting an action upon an insurance policy which suit is pending in the Circuit Court of Jackson County, Missouri, and entitled "James Shay, plaintiff, vs. New York Life Insurance Company, a corporation, defendant."

Appellant respectfully prays the court for a rehearing on the following grounds:

[fol. 90] I

The court on this appeal has approved and adopted its previous opinion entered on a former appeal from the order of the District Court granting a permanent writ of injunction to enjoin the prosecution of the action in the state court on the insurance policy.

The first proposition asserted by appellant in the previous appeal was that when the trial court found, as a matter of fact and as a matter of law, there was no equity in the bill, it lost jurisdiction to determine the issue of disability and hence that issue was not res judicata.

In disposing of this point adversely, this court, in substance, held that when the trial court in the equity case disposed of the charge of fraud, it was necessary for the trial court in that case to decide whether Mr. Toucey was or was not permanently disabled. We respectfully submit that the reasoning of the court so advanced in the former opinion is not sound and is not supported by controlling cases.

In Dowell v. Mitchell, 105 U. S. 430, 26 Law Ed. 1144, being a bill in equity for foreclosure, it was necessary for the court, before granting relief, to find a valid debt (legal issue) and a valid Deed of Trust (equitable issue) before it could order a foreclosure. The trial court found that there was a valid debt but that the Deed of Trust was not valid and, denying foreclosure, entered a judgment on the note. On appeal, it was held by the Supreme Court that when the trial court found the Deed of Trust was not valid, it lost jurisdiction to enter judgment on the note although in order to order foreclosure the trial court must also have found there was a valid debt.

[fol. 91] The same reasoning applied by the court in its previous opinion on the former appeal and here adopted by the court, also applies with equal force to cases in which a contrary result was reached. American Falls Milling Company v. Standard Brokerage and Distributing Co., 248 Fed. 487 (C. C. A. 8); Linden Inv. Co. v. Honstain Bros. Co., 221 Fed. 178 (C. C. A. 8); Palmer v. Marshall, 24 S. W. (2d) 229 (Mo. App.); Ebel v. Roller, 21 S. W. (2d) 214 (Mo. App.); Wimer v. Wagner, 20 S. W. (2d) 650 (Mo. Sup.).

In each and every one of the cases above cited, it was necessary for the trial court to determine both legal and equitable issues favorably to the respective plaintiffs before they could grant equitable relief, but in each case, the appellate court held that, being unable to grant equitable relief the bills should have been dismissed because the trial court in each case affirmatively found they had no equitable jurisdiction.

We respectfully urge that the reasoning of the court in its previous opinion now adopted in its present opinion is illogical, unsound, unsupported by and in conflict with controlling authorities all of which this court has overlooked.

II

In its opinion on the former appeal, now adopted and approved by the court, the court in substance held that when a judgment has been entered in an equity suit pending in a Federal Court, even though that action be in personam, a Federal Court may, in spite of the prohibition contained in Section 265, Judicial Code, Title 28, U. S. C. A., Section 379, enjoin the prosecution of a subsequent suit in personam in a State Court.

[fol. 92] In support of its holding in this respect, this court cited a great many cases all but one of which involved a res and in the one exception, Brown v. Pacific Mutual Life Ins. Co., 62 Fed. (2d) 711, the court found that there was no adequate remedy excepting by injunction.

Here the court has wholly overlooked and failed to give effect to the provisions of the statutes and the fact that appellee here has an adequate remedy at law by way of a plea of res judicata in the action on the policy pending in the State Court.

This court has held that whenever final judgment is entered in an equity suit pending in the Federal Court, whether that action be in rem or in personam, it may and will protect, defend and give effect to its adjudication by enjoining proceedings in a State Court in disregard of the express provisions of the United States Statutes.

It is respectfully submitted that appellant should be granted a rehearing.

Respectfully submitted, Cornelius Roach, Attorney for Appellant.

[fol. 93] (Certificate of counsel omitted in printing.)

[File endorsement omitted.]

[fol. 94] IN UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT

ORDER DENYING PETITION OF APPELLANT FOR REHEARING—
July 22, 1940

The petition for rehearing filed by counsel for appellant in this cause having been considered, It is now here ordered by this Court that the same, be and it is hereby, denied.

[fol. 95] (Order staying Issuance of Mandate, Aug. 3, 1940, omitted in printing.)

[fol. 96] (Order of Sept. 17, 1940, granting Petition of Appellant for further stay of issuance of Mandate, omitted in printing.)

[fol. 97] (Certified copy of Order of Supreme Court of the United States extending time to file Petition for Writ of Certiorari to November 21, 1940, omitted in printing.)

[fol. 98] (Order of Oct. 25, 1940, further staying issuance of mandate, omitted in printing.)

[fol. 99] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER FOR PREPARATION OF TRANSCRIPT OF RECORD FOR SUPREME COURT, ETC.—November 18, 1940

Appellant in this cause filed his motion praying that this Court furnish, without charge, certified record for filing in the Supreme Court of the United States with a petition for

writ of certiorari. Appellant has failed, however, to file proper pauper's oath with his petition.

Estimate of the Clerk's fee for certified transcript of the record was sent to appellant which included the Clerk's fee and the printer's charge for printing the additional proceedings in this Court. There being an unexpended balance in the hands of the Clerk of this Court remaining from the deposits heretofore made by appellant for Clerk's fees and printer's charge for printing the record in this Court which [fol. 100] will be sufficient to pay the Clerk's fee only for necessary transcript of the record for filing in said Supreme Court with petition for writ of certiorari but not the printer's charge for printing same, It is Ordered by this Court that said unexpended balance be applied towards the Clerk's fee and that in preparing the certified record the Clerk of this Court will omit therefrom the motions of appellant for stay of issuance of mandate of this Court filed July 29th, September 11th and October 16, 1940, which motions were granted, and also omit the motion to proceed in forma pauperis and for preparation of record without charge filed November 16, 1940, and copy thereof sworn to, filed November 18, 1940, and thus bringing the amount of the fee within the unexpended balance now in the hands of the Clerk.

[fol. 101] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 102] SUPREME COURT OF THE UNITED STATES

SAMUEL R. TOUCEY, Petitioner,

v.

NEW YORK LIFE INSURANCE COMPANY

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI

On Consideration of the application of the Petitioner,

It is Ordered that the time for filing a petition for certiorari in the above entitled cause be extended to and including November 21, 1940.

Wm. O. Douglas, Associate Justice of the Supreme Court of the United States.

Dated this 25th day of September, 1940.

[fol. 103] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 6, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 587

SAMUEL R. TOUCEY,

Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY,
A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

SAMUEL R. TOUCEY,
Pro Se.

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W. E. Stewart Land Co. v. *Arthur*, 267 Fed. 184 (8th C. C. A.) 61, 80
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 587

SAMUEL R. TOUCEY,

Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY,
A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Samuel R. Toucey, respectfully prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Eighth District to review a decree of that court entered June 29th, 1940, affirming a decree of the United States District Court for the Western Division of the Western District of Missouri. A certified transcript of the record in this case, including the proceed-

ings in said United States Circuit Court of Appeals for the Eighth Circuit is to be furnished by the Circuit Court of Appeals of Eighth District direct to the Supreme Court of the United States under the law, rules and regulations of the Supreme Court.

On April 29th, 1924, appellant paid in full to the New York Life Insurance Corporation's agent the amount of $2182.00 for a full 1924 premium of twelve (12) months on New York Life policy Number 8 611 895, said to go into force and effect January 2nd, 1924.

Policy No. 8 611 895 in bold type on front page states policy in force and effect *January 2nd, 1924*, premium paid and acknowledged for year 1924, policy terms (in ambiguous phraseology) Life and Accident double indemnity: On back page of policy No. 8 611 895, by pen and ink endorsement by the New York Life Home office, policy No. 8 611 895 went into "force and effect" *June 4, 1924.* Component part of policy No. 8 611 895 all Federal court trial exhibits—1) photostatic copy of medical examination application signed jointly by appellant and medical examiner, dated November 13th, 1923, states terms of policy (if one issued) Ordinary Life; 2) New York Life letter dated January 9th, 1924, addressed to appellant (policy No. 8 611 895 not enclosed) urges appellant to buy policy No. 8 611 895, states policy went into force and effect January 2nd, 1924, terms Life and Accident double indemnity, 1924 premium $2182.00, etc.

Policy No. 8 611 895 issued by defendant upon the life of petitioner, put in force and effect by defendant Home office June 4th, 1924, by policy back page pen and ink notation, front page of policy, in bold type, permitted to remain stating policy went into force and effect January 2nd, 1924, face amount of ($50,000.00) dollars, double that amount in event of ACCIDENTAL DEATH, and providing for payment of five hundred ($500.00) per month and waiver of premiums in event of total, permanent disability.

On October 26th, 1935, petitioner commenced a suit in equity against defendant in the Circuit Court of Jackson County, Missouri, at Kansas City: The petition in that suit alleged generally, that in April, 1933, while said policy was in force, petitioner became permanently and totally disabled and that in August, 1934, respondent by fraud and concealment procured the reduction by fifty (50) per cent of the face amount of benefits of said policy, and in October, 1934, respondent by "fraud" and concealment procured the cancellation of said policy for alleged nonpayment of premium. For relief, petitioner prayed that policy be adjudged to be in force; that policy be reinstated; that the attempted reduction be declared null and void; that the premium be declared waived; for recovery of disability benefits of five hundred ($500.00) dollars per month and for return of the quarterly premium paid July 2nd, 1934.

The case was removed from State of Missouri Court in Jackson County to the United States District Court for the Western Division of the Western District of Missouri and defendant filed an answer to the petition and motion to dismiss the general nature of which was to tender the issue on all points, and the prayer asked simply for dismissal of the petition and for costs:

Trial was had to the Court and on November 23rd, 1936, the Court entered its decree dismissing the bill with prejudice. The findings of fact and conclusions of law made by the court were made a part of decree and were as follows:

> 1) That policy was issued, that contract was entered into, January 2nd, 1924. On September 26th, 1934, the plaintiff surrendered that policy voluntarily and took back the same policy, as I understand it, but with a provision that the principle amount to be paid upon his death should be $25,000.00 instead of $50,000.00 with corresponding reductions in the other indemnities provided for in policy:

2) I find the fact to be that the defendant did not in any manner or by any means conceal from the plaintiff that the $50,000.00 contract or policy of insurance did contain a provision for indemnity against total and permanent disability; ON THE CONTRARY, the defendant advised the plaintiff that it contained such a provision:

3) In connection with this declaration of law, and as a corollary thereto, the court further declares the law to be; that under the facts and circumstances of this case, an assured to whom a policy of insurance has been delivered, who has that policy in his possession; if there is nothing in the application for the policy that is inconsistent with the TERMS OF POLICY, is conclusively presumed to know the provisions of the policy; and that under the facts and circumstances of this case, the plaintiff was conclusively presumed to know that the $50,000.00 policy did contain a provision entitling the insured under certain conditions therein stated to the indemnity mentioned of $500.00 per month upon receipt of due proof that the insured was totally and permanently disabled:

The court then said—quote

4) "Perhaps it is unnecessary to go any further in this oral opinion. What I have thus far said determines the case. I think, however, that I should make one further finding of fact concerning an issue of fact that is involved in the case, although perhaps its decision, in view of what I have already said, is not absolutely necessary: If the decision of that issue of fact was decided in finding of fact number one had been otherwise, and if the law as set out in conclusion of law No. 1 had been otherwise, and if, therefore, it had been decided that the plaintiff was entitled to a reinstatement of the $50,000.00 policy, then it would have been necessary to have determined whether he was totally and permanently disabled as alleged in his bill, and whether, also, he had made proper proofs as required by the policy: Now, I do not intend to pass upon the issue of fact as to whether the plaintiff mailed the letters described in

evidence as Exhibits 3 and 4, and whether the defendant received those letters: The testimony of the plaintiff and his secretary was to the effect that the two letters were mailed, and I have no reason to doubt that they were mailed. These witnesses, one of them the plaintiff, was, of course, interested in the result of the case, but I am certain that neither he nor his secretary would swear falsely about a fact of this kind. While I do not make any decision as to that issue, I have no doubt at all that the letters were mailed as the witnesses testified that they were mailed. Whether they were received I do not know—

"He certainly is totally disabled, I would think, from carrying on the same kind of business enterprise as that upon which he was engaged and at which he was very successful. He cannot do anything of that character, but it is an incorrect interpretation of this contract to conclude that if he cannot do what he did do, therefore, he is totally disabled within the meaning of this contract, etc.".

No appeal was taken from that decree.

On December 28th, 1937, James Shay, petitioner's assignee, filed a petition on New York York Life Policy No. 8 611 895 in the Circuit Court of Jackson County, Missouri, at Kansas City: In that petition it was alleged that the policy was issued and while in force, petitioner became totally and permanently disabled; that notice of disability was given to defendant and the prayer was for the recovery of the disability benefits.

Thereupon, on March 10th, 1938, defendant filed its supplemental bill in equity in the original equity case of *Samuel R. Toucey* v. *New York Life Insurance Company*, in which supplemental bill defendant set out the pleadings and decree in such original equity suit, alleged the filing of the action at law upon the policy by the said Shay as petitioner's assignee in the Circuit Court of Jackson County, Missouri, and

for relief prayed that it be adjudged that the rights asserted by said Shay were *res adjudicata* by reason of the decree in the original equity bill suit and further prayed that the prosecution of the suit at law brought by the said Shay be enjoined.

The court issued its decree whereby petitioner and others were enjoined from prosecuting the action at law upon the policy. A writ of injunction was served on petitioner and thereafter, within due time, petitioned filed his motion to dismiss the supplemental bill in equity and motion to dissolve the preliminary injunction. Both such motion to dismiss and motion to dissolve were by the court overruled.

An appeal from the order granting defendant a preliminary writ of injunction and from the order overruling petitioner's motion to dissolve said preliminary injunction was allowed by the District Court and on February 24, 1939, the United States Circuit Court of Appeals for the Eighth Circuit affirmed the judgment of the District Court.

On March 9th, 1939, petitioner filed his motion for rehearing in the said circuit court of appeals and on March 16, 1939, petitioner's petition for rehearing was denied. On March 23, 1939, upon motion of petitioner to stay the mandate, the said court of appeals entered an order staying the issuance of the mandate for a period of thirty (30) days from and after that date.

On April 22nd, 1939, The Honorable Charles Elmore Cropley, Clerk, Supreme Court of the United States, advised appellant's attorney (Mr. Cornelius Roach, Jr.) writ of certiorari was docketed April 22nd, 1939, as number 897, October term, 1938.

On May 29th, 1939, The Honorable Charles Elmore Cropley, Clerk Supreme Court wired appellant's attorney "Petition for writ of certiorari *Toucey* v. *New York Life* denied today—advise Mr. Miller".

On June 3rd., 1939, The Honorable Charles Elmore Cropley, Clerk, Supreme Court, wired appellant's attorney "Court rendered no opinion on denial of petition for certiorari in Toucey against New York Life".

On July 22nd., 1939, the Honorable A. L. Arnold, Clerk, District Court, advised appellant's attorney "The above case has been set for trial before Judge Otis on Monday, August 14th, 1939".

On August 14th, 1939, District Court entered order for permanent injunction and court's final decree under which the Marshal was to obtain New York Life policy No. 8 611 895 and destroy policy, using physical force, if necessary.

Appeal immediately taken

Application for appeal granted.

On February 7th, 1940, the Honorable E. E. Koch, Clerk, Circuit Court of Appeals, Eighth Circuit, advised appellant's attorney that transcript of record was received from District Court and same filed and appeal docketed as number 11686.

On April 10th, 1940, defendant filed motion to affirm the decree of District Court on the ground that the opinion upon the previous appeal (temporary injunction) is binding upon the court.

On April 22nd., 1940, order entered by Judge Stone of Circuit Court of Appeals Eighth Circuit in above case denied motion of appellee for affirmance of decree and order for permanent injunction.

On June 29th, 1940, Circuit Court of Appeals Eighth Circuit entered order affirming the action of the lower court. No new opinion was written the court stating that decision on former appeal would govern. The Honorable E. E. Koch, Clerk, advised appellant's attorney under rule #18 of this Court petition for rehearing may be filed within fifteen days date of decree as entered, June 29th, 1940.

Application immediately made for rehearing.

Rehearing granted.

On July 22nd., 1940, Circuit Court of Appeals Eighth Circuit entered order in above case denying petition of appellant's for rehearing, ordering that mandate of this Court in this case to be issued to the District Court on August 2nd., 1940.

On July 26th, 1940, with no previous warning or advice, appellant received from one of his attorneys (Mr. Cornelius Roach, Jr.) the following letter (quoted) dated July 22nd., 1940, voluntarily withdrawing from any further connection with above entitled case—

> "By reason of the fact no new opinion was written by the Eighth Circuit Court of Appeals, there is no basis for an application for writ of certiorari.
>
> Because there is no basis for an application, I cannot and will not make an application. If you desire to employ other Counsel with respect to the application you are perfectly at liberty to do so. If an application is to be made an application for a stay of mandate must be made immediately." End quote:

Appellant's reply to above letter from Cornelius Roach, Jr., will be found in the certified record of case and the proceedings of the Circuit Court of Appeals, Eighth District, to be furnished the Supreme Court of the United States direct by Circuit Court on petition for writ of certiorari authorized. Appellant's reply to Attorney Roach is dated July 27th, 1940.

Appellant states that within a few days following this correspondence appellant obtained all his papers from Attorney Roach's secretary, did not discuss what, if any action appellant would take with Attorney Roach, when or how, nor has appellant met, discussed or talked with Attorney Roach since receipt of letter from Attorney Roach on July 26th, 1940, dated July 24th, 1940, and for the reasons set

out in appellant's reply to Attorney Roach dated July 27th, 1940.

Firm of Borders, Borders & Warrick (Mr. Cornelius Roach, Jr.) a junior member of same filed suit in Circuit Court of Jackson County, Missouri, December 28th, 1937, as referred to on page four, paragraph two, of this petition, that appellant had not previously to this date, since this date until as mentioned in this petition met any member of this firm of attorneys except Mr. Cornelius Roach, Jr.

That when Federal court entered order for temporary injunction (March, 1938) stopping state court jury trial in Jackson County, Missouri, Attorney Roach made the argument, that appellant was not present in Federal court due to being confined to his home as result of stomach ulcers and emergency operation for same occurring April 1st, 1933. That the arguments by counsel were oral with no record made thereof to guide appellant now to act as his own attorney in this petition for writ of certorari to the Supreme Court of the United States.

That following such order entered by Federal court in the nature of Federal court temporary injunction the firm of attorneys known as Borders, Borders & Warrick started to dissolve.

That the junior member of this firm withdrew entering the law business individually, that later Attorney Warrick withdrew leaving Attorney Borders, Jr., alone in the practice of law individually.

That due to this dissolution of the firm of Borders, Borders & Warrick and a further order to be entered by the Federal court to be later referred to and quoted by this petition in writ of certiorari, appellant will set out when and how he first met Attorney Borders, Jr., and Attorney Dupuy G. Warrick and only after the dissolution of the firm of Borders, Borders and Warrick.

Appellant here restates that appellant did not hear arguments of counsel before Federal court on temporary injunction (April, 1938) nor did appellant hear arguments of counsel before the Eighth Circuit Court of Appeals on appeal; but appellant did hear arguments of counsel before the Federal court when permanent injunction was entered by Federal court August 14th, 1939, also court's final decree ordering Marshal to destroy New York Life policy No. 8 611 895 by "law" and understood the Federal court to rule, as the Circuit Court of Appeals, Eighth District, had defined the "law", as a writ of certiorari to the Supreme Court of the United States had been rejected by the Supreme Court, there was no alternative except for the Federal court to enter permanent injunction and order for court's final decree so entered August 14th, 1939.

Appellant states also that appellant did not hear arguments by Counsel both for Federal court temporary and permanent injunctions entered as well as court's final decree carried to higher court on appeal; nor did appellant hear arguments by Counsel before Circuit Court of Appeals Eighth District on both appeals carried to this higher court on Federal court's temporary and permanent injunctions, also court's final decree, and that both arguments by Counsel were orally made in both appeals, hence appellant has no record of what was said or charged by either Counsel, one for appellant (Mr. Cornelius Roach) or for defendant, New York Life attorneys.

Making this clear to the Supreme Court of the United States in this, appellant's petition for writ of certiorari, praying the Supreme Court of the United States take jurisdiction in above entitled case, appellant proceeds with following and mention made thereof as the preliminary prelude on record of case before entering upon the record of

above entitled case as compiled and certified to by the Circuit Court of Appeals, Eighth District, to be furnished by Circuit Court direct to the Supreme Court of the United States on this petition for writ of certiorari:

Appellant's first act was to call upon attorney Dupuy G. Warrick formerly of Borders, Borders & Warrick, thus meeting to discuss with attorney Warrick the case for appellant the firm of Borders, Borders & Warrick filed in the Circuit Court of Jackson County, Missouri, December 28th, 1937, in above entitled case for the first time.

Appellant states that he did not offer the above entitled case to attorney Warrick at this time, nor did attorney Warrick indicate he desired to act as appellant's attorney; but the appellant did plainly state to attorney Warrick at this time appellant believed he would be unable to find any attorney in greater Kansas City expecting to practice law before the Federal court of Judge Merrill E. Otis who would want to take the above entitled case and represent appellant to a definite conclusion before the Supreme Court of the United States. Appellant then left the office of attorney Warrick, did not call on any other attorney following this discussion with attorney Warrick before acting as outlined in this petition for writ of certiorari or since:

On July 27th, 1940, appellant petitioned Circuit Court of Appeals Eighth Circuit acting as his own attorney praying order be entered by the Court staying the mandate to issue on August 2nd, 1940, to District Court for a period of sixty (60) days from July 22nd, 1940, and for permission to file petition for writ of certiorari to the Supreme Court of the United States so Supreme Court could review the above entitled case in its entirety.

On July 30th, 1940, the Honorable E. E. Koch, Clerk, Circuit Court of Appeals, Eighth District, acknowledged re-

ceipt of appellant's July 27th, 1940, letter as follows—quote:

> "Yesterday I received yours enclosing "Notice of appellant to stay mandate. This has been filed and it will be brought to the attention of the Court at the earliest opportunity at St. Paul, Minnesota: Attached to the above paper is—
>
> Copy of letter of Mr. Cornelius Roach addressed to you; under date of July 24th, 1940;
>
> Copy of your letter dated July 27th, 1940, to Mr. Roach;
>
> Copy of affidavit in support of petition for rehearing before the District Court of the United States for the Western District of Missouri;
>
> Letter of Judge Otis addressed to you under date of February 12, 1937;
>
> Copy of your letter to Judge Otis dated February 5th, 1937;
>
> Copy of letter to Judge Otis dated January 8th, 1937;
>
> Copy of letter of Judge Otis, addressed to you of January 11th, 1937".

On August 7th, 1940, the Honorable E. E. Koch, Clerk, Circuit Court of Appeals, Eighth District, wrote appellant court had entered order dated August 3rd, 1940, staying mandate to issue to District Court for thirty days from August 3rd, 1940, and granting petition prayed for to petition the Supreme Court of the United States for writ of certiorari, petition to be before Supreme Court within period granted in order, record and certificate by the Clerk of Supreme Court to be before Eighth District Court of Appeals within thirty day period granted, etc.

On August 9th, 1940, appellant petitioned the Supreme Court of the United States for writ of certiorari.

On August 12th, 1940, The Honorable Charles Elmore Cropley, Clerk, Supreme Court (signed E. P. Cullinan)

replied to appellant, returning petition for writ of certiorari and explained same was improperly drawn, fully instructing appellant how to properly proceed, advising immediately upon receipt of properly drawn writ, Circuit Court of Appeals Eighth District order complied with fully, case would be docketed and appellant be so advised:

On August 19th, 1940, The Honorable Charles Elmore Cropley, Clerk, Supreme Court (by E. P. Cullinan), advised appellant by letter in response to appellant's letter appellant had three calendar months from the date of judgment (July 22nd, 1940) to file petition for writ of certiorari with the Supreme Court:

On August 30th, 1940, appellant wrote The Honorable E. E. Koch, Clerk, Circuit Court of Appeals Eighth Circuit in regard to completion of record for writ of certiorari authorized to the Supreme Court of the United States and the advice received by appellant from Clerk of Supreme Court appellant had three calendar months from date of order—judgment—(July 22nd, 1940) to file writ of certiorari with the Supreme Court of the United States:

On September 3rd, 1940, The Honorable E. E. Koch, Clerk, Circuit Court of Appeals Eighth District advised appellant petition for writ of certiorari had not been filed with Supreme Court of the United States by appellant as stated by order of his Court entered September 3rd, 1940, as Circuit Court of Appeals had not been called upon to file certified record in above entitled case by September 3rd, 1940, nor had the Clerk of the Supreme Court filed certificate for writ of certiorari with clerk of Circuit Court of Appeals, hence issuance of mandate would occur to the District Court on September 3rd, 1940, but it was plain from The Honorable E. E. Koch's letter advice to appellant the Circuit Court of Appeals, Eighth District due to pressure of other work would not immediately issue mandate to District Court on September 3rd, 1940, also advising appellant it was

clerk's understanding petition for writ of certiorari, under the law, could be filed with the Supreme Court within three months from date of judgment, July 22nd, 1940.

On September 4th, 1940, appellant wrote The Honorable Charles Elmore Cropley, Clerk, Supreme Court, enclosing letter dated September 3rd, 1940, received from The Honorable E. E. Koch, Clerk, Circuit Court of Appeals Eighth District:

On September 6th, 1940, the Honorable Charles Elmore Cropley, Clerk, Supreme Court (signed H. B. Willey), advised appellant how to proceed in further petitioning Circuit Court of Appeals Eighth District:

On September 10th, 1940, appellant petitioned Circuit Court of Appeals Eighth District if mandate had not issued to District Court praying mandate be stayed; if mandate issued prayed order be entered by Court recalling mandate:

On September 17th, 1940, Circuit Court of Appeals Eighth District entered order staying mandate pending petition for writ of certiorari to the Supreme Court of the United States for a period of thirty days from and after September 17th, 1940, fully defining Court's order to comply with terms of order thus entered:

On September 22nd, 1940, appellant petitioned the Supreme Court of the United States praying for extension of time to file writ of certiorari petition and praying for an additional extension of time be granted of thirty days beyond the three calendar month time permissible by law from date of judgment (July 22nd, 1940), and stated as reasons for such additional extension of time several reasons so justifying request: One such reason was appellant had charged to the Attorney General of the United States in February, 1939, that two officers of the New York Life Kansas City Branch office had committed perjury in Federal court trial (1936) by denying possession of New York Life policy, No. 8 611 895 on June 29th, 1934: That

appellant, being advised by the District Attorney (June, 1940) appellant and witnesses could testify before the Federal grand jury shortly, checked out of hospital directly after checking in to insure one of appellant's witnesses would be subpoeaned by Federal grand jury to testify, namely, Mr. Edward G. Mura, head of the Kansas City Insurance Underwriters in 1934, and head of the New England Mutual Insurance in 1934 and at this time. That Mr. Edward G. Mura had called at appellant's office morning of June 29th, 1934 (never having been in appellant's office previously), requesting appellant to let him have New York Life policies as he desired to analyze policies to determine if said policies contained a "health" clause and, if so, advise appellant: That appellant had advised Mr. Mura an officer of the New York Life (Mr. Wells) on appellant's request had just called at office, obtained the New York Life policies and returned to his New York Life office same to analyze policies to determine if policies contained a "health" clause and to advise appellant, etc.: That while these two New York Life officers testified in Federal court (1936) appellant had Federal court subpoena Mr. Edward G. Mura to appear and testify, but, when one of the officers completed his testimony, he left court room with his attorney, called upon Mr. Edward G. Mura and requested Mr. Mura not to testify at trial as to his knowledge: That motion for rehearing made, supported by affidavit setting out these facts, Federal court denying motion for rehearing: That on appellant's request also Federal court had subpoenaed Veterans Administration's Wadsworth, Kansas, hospital to produce official hospital report on appellant dated February 1st, 1936, as their patient as evidence before Federal court trial, subpoena was served on hospital, but hospital ignored subpoena thus Mr. Mura did not testify at trial, nor did official hospital report get in record of trial: Other reasons set out also:

Mr. Edward G. Mura testified before Federal grand jury July 17th, 1940: It took appellant, therefore, from November, 1936, until July 17th, 1940, and with constant effort by appellant it took until July 17th, 1940 (*a period of over four years*), to arrange for Mr. Edward G. Mura to testify before some legal official body: That Federal court denied motion for rehearing in 1936 with full affidavit support defendant had interferred with Mr. Mura, a subpoenaed witness; that Federal court then entered temporary injunction (March, 1938) stopping State court jury trial; that same Federal court had convened Federal grand jury before which Mr. Mura did finally testify July 17th, 1940, but appellant was forced to leave a hospital in June, 1940, and work hard on District Attorney's office daily until appellant actually put Mr. Mura before a Federal grand jury to testify July 17th, 1940: The jury then went into recess on October 24th, 1940, appellant nor his other witnesses completed their appearance before jury and appellant and his other witnesses must now wait until perhaps December, if not into 1941 to appear before Federal grand jury and complete perjury charge.

On September 25th, 1940, Mr. Justice Douglas of the Supreme Court of the United States entered order extending time for filing writ of certiorari until November 21st, 1940.

On September 26th, 1940, Federal court (Judge Merrill E. Otis) enters order citing appellant for contempt of court because court's final decree had not destroyed policy No. 8 611 895. Quote:

> "To Samuel R. Toucey, and Cornelius Roach and M. W. Borders, Jr., his attorneys:
>
> "You are hereby ordered to be and appear in this court on the 30th day of September, 1940, at the hour of 9:30 A. M. and show cause, if any there be, why you have failed to perform the terms of the second paragraph of the final decree made and entered herein

on the 14th day of August, 1939, requiring that you forthwith physically surrender to the Marshal of this Court New York Life Insurance Company policy No. 8 611 895 and show cause, if any there be, why you, the said Samuel R. Toucey, should not be adjudged guilty of contempt of this Court for failure to comply with said decree." Signed Merrill E. Otis, Judge.

The appellant will resume continuation of court proceedings with the quotation of above Court order entered September 26th, 1940, and devote the intermediate pages of this petition in writ for certiorari to the Supreme Court of the United States up to *page twenty-eight* of this petition with the hope "law" will not destroy New York Life policy No. 8 611 895, *resuming on page #53 of this petition the continuation of Court proceedings thus stopped here.*

1) It is apparent appellant is not guilty of contempt of court with the order entered by Mr. Justice Douglas of the Supreme Court.

2) Appellant hopes to make it apparent to the Supreme Court of the United States in this petition for writ of certiorari New York Life policy No. 8 611 895 is required for *evidence* before the *Federal grand jury* in appellant's perjury charge against two officers of the New York Life in denying possession of policy No. 8 611 895 June 29th, 1934, in Federal court, 1936, testimony, for New York Life so called LEGAL FAILURE to comply with terms of policy No. 8 611 895 with appellant as, by this Federal court perjury, the New York Life escaped its policy obligation to appellant and CRIMINALLY thus escaped GUILT OF PERJURY for failure to comply with terms of policy No. 8 611 895: Appellant believes, in the long end, the Federal grand jury will give the answer.

3) New York Life policy No. 8 611 895 conceived in "fraud" issued in "fraud" protected by law in "fraud"

is needed by appellant (contains component part, signed medical application by appellant and medical examiner dated November 13th, 1923) to prove medical examination obtained by "fraud" to the Veterans Administration whose board of appeals by decision rendered Nov. 12th, 1937, disallowed appellant's claim as a veteran and decision quotes New York Life medical examination as one of the reasons.

In February, 1939, appellant filed with the Attorney General of the United States perjury charges against two officers of the New York Life for Federal court perjury in Federal court trial, 1936.

Charged that these two officers of the New York Life denied possession of New York Life policy No. 8 611 895 either by the New York Life or themselves on June 29th, 1934: That the New York Life New York City office also denied by deposition that they received from appellant a letter dated June 29th, 1934, on medical examination made against which policy No. 8 611 895 had been issued as well as other medical examinations, etc.

That the New York Life wrote appellant a letter dated January 9th, 1924, stating therein policy No. 8 611 895 carried te[illegible]s of Life and Accident: Also filled with other mis-statements:

That the Veterans Administration requested appellant on June 28th, 1934, to write the New York Life New York City office immediately on medical examinations; also that the Veterans Administration on June 28th, 1934, requested appellant to sign two government affidavits one of which affidavits required appellant to state thereon if the terms of New York Life policies as well as any insurance policy was just "Life"—"Life or Accident"—or "Life, Health & Accident": That appellant did not sign these two government applications on June 28th or on June 29th, 1934, but after June 29th, 1934, appellant did sign both govern-

ment affidavits and the one affidavit covering commercial insurance appellant signed stating thereon his New York Life Insurance policies carried terms of "Life & Accident". No mention made of "health".

That the records of Veterans Administration prove that the New York Life New York City office did receive appellant's letter dated June 29th, 1934, and acted upon it and also endeavored to deceive the Veterans Administration at same time:

That the records of the Veterans Administration tended to prove my perjury charge against these two officers of the New York Life by their testimony in Federal court; that appellant had witnesses who would prove this Federal court perjury and committed by these two New York Life officials to avoid legal possession of New York Life policy No. 8 611 895 on June 29th, 1934, to not only exploit the appellant legally, but to legally exploit all policy holders in State of Missouri as well as the United States:

That the Federal court had been deceived by the New York Life with its perjury; that the Federal court had been deceived by the New York Life and *rendered decision in full disagreement with Missouri established law on insurance policy disability clause;* that aside from Federal court perjury appellant would put before the Justice Department also a charge a Veterans Administration Hospital withheld knowingly and on Federal court issued and served subpoena on hospital to produce official hospital report on appellant at Federal court trial, that thus official hospital report did not get into record of trial making a beautiful legal setup so that if appellant was forced to appeal a Federal court decision in disagreement with Missouri State law would get nowhere: No hospital report to base such appeal on:

Appellant also made this charge against Veterans Administration's Hospital to Justice Department (The Honorable Frank Murphy) under date of February 16th, 1939: Ac-

knowledgment was made under date of March 16th, 1939, as follows: Quote

> "We have your communication of February 16th, 1939, requesting an investigation of Veterans Administration. This department has no authority to intervene in matters coming under the jurisdiction of any other organization of the Federal government. We regret, therefore, that we can be of no assistance to you. The file on your case forwarded with your communication is returned." Signed T. D. Quinn, Administrative Assistant to Attorney General.

Appellant states, under such a circumstance, all which could be done was to await Federal grand jury result, hope for indictments on perjury charge, then bring out at trial the full facts as to why a government hospital openly ignored a served Federal court subpoena to produce hospital report as evidence before Federal court trial;

Or, as the Federal court itself had denied motion for rehearing supported by affidavit stating New York Life Kansas City Branch office Cashier (Shellhorn) and his attorney had interferred with Federal court subpoenaed witness, Mr. Edward G. Mura, during session of trial, Mr. Mura not testifying at trial as to his knowledge; the Federal court then, when the same suit was going to trial in State of Missouri court, March, 1938, jury all but climbing into jury box to hear the complete suit, Federal court had stopped State court jury trial with Federal court temporary injunction, as the Federal court injunction had been appealed if the Federal court rendered decision of November 23rd, 1936, had not been appealed, and because Federal court by decision had disagreed with Missouri State established law on insurance policy disability clause, hospital report not in record of trial to use on appeal of November 23rd, 1936, Federal court disagreement decision, all appellant could do here was to await and hope higher court would overrule

Federal court temporary and permanent injunctions, court's final decree, all on appeal and if so bring out the ignoring of Federal court subpoena on part of hospital, also withholding official hospital report as evidence before Federal court trial, in holding State court jury trial Federal court stopped by injunction March, 1938.

Appellant plainly states in petition for writ of certiorari to the Supreme Court of the United States these facts:

New York Life policy No. 8 611 895 was and is not only necessary as evidence before the Federal judiciary.

That it would be a terrible injustice to appellant and never so intended to be the law under the Constitution if Federal judiciary decrees were to destroy New York Life policy No. 8 611 895 and claim it to be the "law", denying appellant the right of first a "fair" trial then let decision be what it may:

That New York Life policy No. 8 611 895 is needed by appellant for two other purposes aside from Federal judiciary evidence where appellant also has, to date, met with unjust consideration, namely—

1) In June, 1940, appellant requested United States District Attorney at Kansas City, (Mr. Victor K. Phelps, Acting District Attorney) to subpoena New York Life policy No. 8 611 895, take photostatic copy with all component parts, including photostatic copy of medical examination application signed by appellant and medical examiner November 13th, 1923, and put such photostatic copy before the Federal grand jury as permanent evidence to which appellant could refer when he testified fully before the Federal grand ju[illegible] on perjury charge against two officers of the New York Life committing perjury in Federal court trial of 1936 by denying possession of New York Life policy No. 8 611 895 on June 29th, 1934, and for what purpose policy

was in both the possession of the New York Life on this date and also these two New York Life officials:

That District Attorney (Mr. Phelps) advised appellant this District Attorney's office could not do as to so do would subject the District Attorney's office to citation for contempt of court due to Federal court's final decree entered August 14th, 1939, for Marshal to destroy New York Life policy No. 8 611 895.

That appellant appeared only for ten minutes before the Federal grand jury on October 24th, 1940, the jury going into recess, the time allowed insufficient to exhibit the 1923 and 1924 "fraud" New York Life policy No. 8 611 895 and component part of policy alone proves; nor could appellant leave policy No. 8 611 895 as evidence before Federal grand jury, nor did appellant leave policy No. 8 611 895 as evidence before Federal grand jury October 24th, 1940, for fear of appellant himself being cited for contempt of court if appellant photographed policy and component parts or did not have policy No. 8 611 895 and component parts in appellant's possession should the Marshal call upon appellant and again demand policy No. 8 611 895 in the name of the law to destroy same.

District Attorney has advised appellant himself and witnesses can complete testimony and evidence before Federal grand jury when jury again convenes (perhaps in December, 1940) and appellant states if New York Life policy No. 8 611 895 is not destroyed by "law" in mean time appellant will prove to Federal grand jury New York Life policy No. 8 611 895 was in the possession of New York Life and its two officials June 29th, 1934, for what purpose policy No. 8 611 895 was in such possession June 29th, 1934, on appellant's request on New York Life and demonstrate to Federal grand jury from New York Life policy No. 8 611 895

the following proof both policy and its component parts alone hold, namely—

1) New York Life signed agreement dated November 13th, 1923, confirming New York Life had analyzed all appellant's Life Insurance policies then in force and effect with other companies, advising appellant to retain certain policies in force, but to cancel off $70,000.00 straight life insurance in three policies in two different insurance companies and buy in their place New York Life—Life and Accident double indemnity policy thus making less policies to watch and pay premiums on by only having the one New York Life policy to watch and pay premiums on, etc. That if appellant would permit his medical examination by the New York Life that date (November 13th, 1923) it did not obligate appellant to buy any New York Life policy if he did not so order, etc.

2) Medical application with New York Life, signed by appellant and medical examiner November 13th, 1923, specifies the names of the two other commercial insurance companies appellant had three insurance policies in full force and effect, said three policies to be terms of "straight life": That said signed application also states terms of policy, should one be issued against such medical examination, would be Ordinary Life. Application makes no mention of a "health" coverage.

3) New York Life Kansas City Branch office wrote appellant a letter dated January 9th, 1924, (not enclosing policy No. 8 611 895) advising New York Life policy No. 8 611 895 had been issued, terms Life and Accident double indemnity, premium for 12 months of 1924 $2182.00, policy then in force and effect January 2nd, 1924, urging appellant to buy said policy, etc.

4) That appellant on January 12th, 1924, replied to New York Life's above January 9th, 1924, letter, advising that he did not order policy No. 8 611 895, it was agreed medical examination made November 13th, 1923, was not made to buy any New York Life policy; while a joint Life and Accident policy appealed to appellant, as appellant was under obligations with his other insurance to buy any additional insurance from them he was not free to buy any insurance from the New York Life or anybody; that appellant would see his other insurance upon return to Kansas City and discuss, etc.

New York Life letter dated January 9th, 1924, was mailed, addressed and received by appellant at St. Anthony Hotel, San Antonio, Texas, and appellant's reply thereto dated January 12th, 1924, also written, signed, mailed and addressed to the New York Life Kansas City Branch office from San Antonio, Texas.

5) On April 29th, 1924, appellant (back in Kansas City) bought from the New York Life its policy No. 8 611 895 and only had before appellant the New York Life letter dated January 9th, 1924, and appellant's reply dated January 12th, 1924, that policy No. 8 611 895 had never been in appellant's "possession previous to April 29th, 1924, on April 29th, 1924, appellant paid New York Life in cash a 1924 premium of $2182.00 for 12 months insurance under policy No. 8 611 895 but only received less than six months insurance under policy in 1924; that policy itself is proof policy was not in appellant's possession as New York Life Home office executed trust agreement against policy No. 8 611 895, put policy in force and effect June 4th, 1924, by pen and ink notation on back page of policy, leaving front page to state in bold type, policy "in force and effect January 2nd, 1924" terms of policy in ambiguous phraseology Life and Accident double indemnity": That the New York Life Home office, or

the New York Life Kansas City Branch office ever advised appellant of the change made in policy No. 8 611 895 as stated, never advised appellant the terms of policy were any different than as set out in New York Life Kansas City Branch office letter dated January 9th, 1924; never advised appellant New York Life put policy in force and effect June 4th, 1924, eight months following their November 13th, 1923, medical examination against all insurance underwriting rules and regulations, undoubtedly against law itself; influencing appellant to cancel one policy in full force and effect April 29th, 1924, with Kansas City Life, two policies in full force and effect on April 29th, 1924, with the Guaranty Life of Iowa Insurance Company; that appellant did so cancel these three policies to buy New York Life policy No. 8 611 895 and did so buy New York Life policy No. 8 611 895 on April 29th, 1924, thus leaving appellant's family without $70,000.00 insurance coverage in said cancelled three policies from April 29th, 1924, until June 4th, 1924, when New York Life policy went into force and effect, etc.: In addition to the foregoing a New York Life Document—a component part of policy No. 8 611 895—proves on or about May 20th, 1924, the Home Office of the New York Life changed terms of policy No. 8 611 895 and changed the policy terms different than set out in New York Life letter to appellant dated January 9th, 1924, saying nothing to appellant about this and all other "fraud" the New York Life purposely, deliberately and intentionally perpetrated upon appellant in years 1923 and 1924.

That Veterans Administration's Kansas City office requested appellant on June 28th, 1934, (ten years later) to immediately write the New York Life New York City office on medical examinations; that appellant did so write the New York Life New York City office on June 29th, 1934; that Veterans Administration's Kansas City office on June

28th, 1934, also requested appellant to sign two affidavits, but that appellant did not on June 28th, 1934, sign either of the two affidavits, nor on June 29th, 1934, but after June 29th, 1934, appellant did sign both affidavits and on the one requiring appellant state all insurance policies both "in force and not in force" and terms of each policy, appellant signed the affidavit and stated thereon New York Life policies provided terms of Life and Accident:

The Veterans Administration's Kansas City office testified at Federal court trial, 1936, with their records, corroborating all the appellant's testimony with most of the above facts stated in appellant's testimony; appellant particularly testifying that the New York Life did take action on appellant's letter to the New York Life Home office dated June 29th, 1934, which proves this Home office received such letter as the New York Life Home Office attempted to withhold from the Veterans Administration a 1932 three day New York City medical examination New York Life medical laboratory made on appellant; that this "1932 medical examination was called for by the Veterans Administration by direct request on the New York Life New York City office after appellant wrote this Home office letter dated June 29th, 1934, the New York Life home office furnishing to Veterans Administration all medical examinations made on appellant starting with the medical examination of November 13th, 1923, (comprising several in following years) but in a most subtle manner made no mention of New York Life three day medical examination in fall of 1932 made on appellant's request (not to buy insurance) did not furnish such 1932 medical examination to Veterans Administration, did not mention its existence, etc: That appellant discovered this from the records within the Veterans Administration itself, called Veterans Administration's attention thereto and Veterans Administration then called upon the New

York Life Home Office to furnish to Veterans Administration immediately their 1932 medical examination on appellant when and when only did the New York Life so furnish.

The Veterans Administration records hold more conclusive proof: Their records show that on the same date they originally wrote the New York Life home office to furnish all medical examinations made on appellant, Veterans Administration also wrote several other insurance companies who had examined appellant and sold him insurance policies, but that this other insurance refused to furnish such medical examinations to Veterans Administration on appellant stating as reason appellant had not made personal request upon them that they do so: That the Veterans Administration did not request appellant on June 28th, 1934, to write any other insurance home office other than the New York Life; that the Veterans Administration so testified from their records in the full corroboration of the appellant's testimony in Federal court; that after this other insurance made this refusal as stated, the Veterans Administration called appellant in, prepared letters on this other insurance for appellant to sign, that appellant did so sign and then and then only did this other insurance furnish to the Veterans Administration medical examinations as made on appellant: None of this other insurance undertook to withhold any of the medical examinations made on appellant either through a claimed oversight or otherwise. That is not the record of the New York Life within Veterans Administration records.

It is an outstanding, conspicuous fact from appellant's Federal court testimony the New York Life 1932 medical examination for three days, fluoroscopic, X-Ray, etc., pronounced appellant to be normal, nothing wrong yet *40 pounds* in weight, taking quantities of soda daily, etc.

A few months later emergency operation for stomach ulcer protrusion, made helpless in a Chicago hotel room,

thrown into the hands of an unethical hotel medical staff, held 15 hours for "acute indigestion", due to New York Life 1932 medical examination influencing this unethical hotel staff to make a wrong diagnosis; then this hotel surgeon operates; demands $3500.00 for the operation; withheld patient from his own surgeon in Chicago and with full knowledge; only succeeded in collecting $500.00 from appellant; and all this appellant testified to in Federal court trial.

The New York Life then use this unethical hotel surgeon as their star witness (by deposition) at Federal court trial.

Appellant intends to prove to the Federal grand jury, or on an indictment trial for perjury charged, that the New York Life paid this unethical hotel surgeon from the record of this hotel surgeon, his lawyers and his bank trying to collect $3,000.00 from appellant. It all ceased when surgeon made New York Life deposition.

6) The sixth reason why New York Life policy No. 8 611 895 should not be destroyed by "law" and prevent this document as evidence before Federal grand jury on perjury charge is:

Appellant put into possession of the District Attorney on September 1st, 1939, the same identical perjury charge and against the same identical New York Life officers (Cashier Shellhorn and his assistant, Mr. Wells) which perjury charge was put before the New York Life directorate on November 23rd, 1936, date Federal court rendered its decision and this Exhibit #23 since in possession of the District Attorney on September 1st, 1939, has not as yet been in evidence before the Federal grand jury.

On July 24th, 1934, a New York Life officer, Mr. M. M. McKinney, appeared in appellant's office: Appellant did not know him, Mr. McKinney had to identify himself to appellant, advised appellant he had been sent by Cashier Shell-

horn to confer with appellant about reducing his insurance in New York Life under policy No. 8 611 895, take the cash surrender values on other three New York Life policies: After this discussion between appellant and Mr. McKinney on July 24th, 1934, appellant requested Mr. McKinney to confirm the discussion in writing: This the New York Life by letter dated July 25th, 1934, signed by Mr. McKinney, New York Life letter dated August 10th, 1934, signed by Mr. McKinney, did and appellant's letter to the New York Life New York City office dated August 11th, 1934 (all in record), enclosing to the New York City office New York Life Branch office letters dated July 25th, 1934, and August 10th, 1934, signed by Mr. McKinney, resulted.

It does not make legal sense nor common sense to assume appellant, being an individual capable of paying the New York Life approximately $60,000.00 since 1924, starting on April 29th, 1924, ending at end of 1934, at a clip of $5,000.00 per year for 1932, $5,000.00 for 1933; $5,000.00 for 1934 who, upon receipt of a New York Life letter dated July 25th, 1934, signed M. M. McKinney, believed he had reduced New York Life policy No. 8 611 895 from $50,000.00 to $25,000.00, believed premium to be paid up in full on the $25,000.00 until January 2nd, 1935, believed that he would receive in cash not later than August 10th, 1934, $1,474.00 for the cash surrender value of three other New York Life policies, four policies in all delivered to Mr. Wells of the New York Life, Mr. Shellhorn's assistant, by appellant's secretary and in his presence June 29th, 1934, to be advised if said policies contained a "health" clause, advised by Cashier Shellhorn by telephone about three o'clock P. M., afternoon of June 29th, 1934, policies did not contain a "health" clause; but advised by the New York Life letter dated July 25th, 1934, appellant would receive a New York Life check for $1,474.00 not later than August 10th, 1934, but received from the New York Life still another letter dated August 10th, 1934,

in lieu of check, also signed by Mr. McKinney, and do nothing about trying to collect from the New York Life immediately the $1,474.00 cash needed immediately by appellant.

Appellant did call at the New York Life Branch office on August 11th, 1934, and put the McKinney letters dated July 25th, 1934, and August 10th, 1934, before Mr. McKinney personally, demanded that Mr. McKinney write the New York Life New York City office immediately, advising that the appellant demanded the $1,474.00 cash at once, etc.

As Mr. McKinney advised appellant as they had made the mistake, it would be embarrassing for them to themselves write the Home Office, but for the appellant to write the Home Office.

The appellant did so write the Home Office as thus requested, and on August 11th, 1934, and on August 14th, 1934, appellant called again at the New York Life Branch office, Mr. McKinney in person made out the check in his own handwriting for appellant to sign, appellant did so sign on August 14th, 1934, check drawn on appellant's bank, Commerce Trust, in payment of a forced premium appellant understood to be paid in advance from New York Life letter dated July 25th, 1934, signed by M. M. McKinney, covering policy No. 8 611 895 until January 2nd, 1935. The New York Life letter dated August 10th, 1934, however, changed the situation, and the last day of grace was August 14th, 1934, to pay premium appellant thus paid on policy No. 8 611 895. Appellant marked personally on check drawn thusly by Mr. McKinney "paid under protest."

On August 14th, 1934, at the same time Mr. McKinney personally made out check, as stated, for appellant to sign, appellant put into the hands of Mr. McKinney to note, the appellant's letter written and mailed to the New York Life New York City office, dated August 11th, 1934, which Mr. McKinney requested appellant to write on August 11th,

1934: Mr. McKinney noted this letter and returned it to appellant, the manifold copy. Appellant then was given positive assurance by the New York Life through Mr. McKinney the Kansas City Branch Office would handle with the New York office the confusion in appellant's status as set out in New York Life letter to appellant dated July 25th, 1934, and August 10th, 1934, with a view to reaching settlement with appellant before another premium was due on policy No. 8 611 895 after premium thus paid under protest by appellant August 14th, 1934, due to be paid on August 2nd, 1934, as last day of grace but extended by authority of New York Life letter dated August 10th, 1934.

Mr. McKinney, testifying for the New York Life following Cashier Shellhorn and his assistant, Mr. Wells, to stand in Federal court, did not deny any or all of these facts testified to by the appellant at the outset of trial. After the Shellhorn and Wells perjury, and before Mr. McKinney testified, appellant warned Mr. McKinney not to himself commit perjury, as he knew that Cashier Shellhorn did commit perjury, as Cashier Shellhorn had admitted to appellant, in Mr. McKinney's presence, on September 11th, 1935 (date appellant discovered Shellhorn and Wells wrongful advice policy No. 8 611 895 did not contain a health clause), that he (Shellhorn) in June, 1934, did receive request from appellant to send his policy expert down to appellant's office, obtain actual New York Life policies, analyze said policies and advise appellant if said policies contained a "health" clause; that he (Shellhorn) did send his Mr. Wells down to appellant's office immediately, did not have a policy expert available in his office at the time, and that Mr. Wells was not competent to analyze a policy, etc.

Due to this Cashier Shellhorn admission to appellant in Mr. McKinney's presence on September 11th, 1935, appellant later, noticing the New York Life directorate advertised to work without salary, gladly invited policy holders

to write them, that they welcomed such letters, worked to protect policy holders, etc., appellant wrote the New York Life directorate accordingly on March 21st, 1936, and received a director's personal reply dated March 31st, 1936 (eight months before Federal court trial), which directorate reply influenced appellant to believe there would be no trial on suit appellant filed in State court October, 1935, and for the reason Cashier Shellhorn had admitted to appellant in the presence of Mr. McKinney on September 11th, 1935, sufficient of the June 29th, 1934, personal contacts with Cashier Shellhorn and his assistant, Mr. Wells, to show that these two New York Life officials did not meet their policy obligation to a policy holder with the appellant.

When Mr. McKinney did not commit perjury in character of testimony he rendered in Federal court, appellant wrote the New York Life directorate on November 23rd, 1936 (date Federal court decision rendered), making perjury charge to the New York Life directorate against Cashier Shellhorn and Mr. Wells, due to their testimony rendered in Federal court, and referred the directorate to the March, 1936, interchange with appellant. Frequent interchanges occurred between the appellant and the New York Life directors in person up to May 4th, 1937 (seven months after entering perjury charge November, 1936), but on May 4th, 1937, four days after free time elapsed to appeal Federal court decision (May 1st, 1937), a secretary for a director simply wrote appellant, "The President stated the Federal court trial and decision rendered November, 1936 was fair". No mention made of perjury charge.

As appellant had conducted his correspondence with the New York Life directors personally since entering perjury charge November 23rd, 1936, appellant requested a director make an explanation to appellant in person as to what a director's secretary's letter to appellant dated May 4th, 1937, meant.

After appellant's persistent effort, on September 3rd, 1937, a New York Life director personally wrote the appellant to take the perjury charge to the courts.

Appellant refiled his suit again in Missouri State Court on December 28th, 1937, in response to this director's invitation to do so.

On March, 1938, it was met with a Federal court temporary injunction stopping State court jury trial invited to be staged by the New York Life directorate on September 3rd, 1937.

Appellant here states to the Supreme Court of the United States there is something unholy about all this:

Appellant believes any red blooded Federal grand jury or any red blooded jury presented with appellant's perjury charge against these two New York Life officials, documentary evidence, policy No. 8 611 895 and component parts as evidence, witnesses with knowledge, etc., and then put before the jury the New York Life directorate advertisements, what the directorate offer to do to protect policy holders through advertisements, then put before the jury this New York Life November 23rd, 1936, perjury charge, a New York Life director on September 3rd, 1937, inviting a court trial to determine it, such a jury would unquestionably accommodate the New York Life directorate by indictments for these two New York Life officials.

The United States District Attorney (Acting District Attorney, Mr. Victor K. Phelps) has fully co-operated with me to the end this perjury charge will be made. While true it has been before the Federal government for a long period it is likewise true 137 different insurance companies were charged with deceiving a three judge Federal court defrauding policy holders out of from ten to twelve millions of dollars. This preceded appellant's perjury charge and has occupied the attention of the Federal grand jury. However, the District Attorney's office advised appellant Mr.

Edward G. Mura testified before the Federal grand jury on July 17th, 1940, as to his knowledge on possession of New York Life policy No. 8 611 895 as set out in affidavit on motion for rehearing denied by Federal court to be among the proceedings of Circuit Court of Appeals Eighth Circuit when submitting certified record of case to Supreme Court on writ of certiorari.

As quoted on page #10 the Federal court's final decree under which Marshal is to destroy policy No. 8 611 895, and as mentioned on page #12, last paragraph, appellant thus states one reason why policy No. 8 611 895 should not be destroyed by law.

The second reason why New York Life policy No. 8 611 895 should not be destroyed by law also to be mentioned as indicated on page #12 is the following:

The Veterans Administration's Kansas City office testified at Federal court trial with records, fully corroborating appellant's testimony.

On August 2nd, 1940, when the Circuit Court of Appeals, Eighth Circuit, July 22nd, 1940, order was to send mandate to District Court August 2nd, 1940, as stated appellant took this action.

In affidavit to Veterans Administration dated August 2nd, 1940, appellant requested Veterans Administration to eliminate from all medical records on appellant (also a veteran) all New York Life medical examinations made on appellant, the first on November 13th, 1923 (photostatic copy a component part of policy No. 8 611 895), the last fall of 1932, several during intermediate years. There was ample justification for this and the evidence was before the Veterans Administration on the record of appellant.

The Board of Veterans' Appeals in decision rendered on November 12th, 1937, quotes New York Life medical examinations in support of decision disallowing appellant's claim for financial relief.

Quote below affidavit made to Veterans Administration by Dr. H. A. Baker, Medical Director for the Kansas City Life who was one of the doctors examining the appellant for their insurance November 27th, 1922, quote (dated May 29th, 1936):

> "Enclosed herewith is photostatic medical application blank on Major S. R. Toucey:
> I examined Major Toucey myself for a policy in the Kansas City Life on November 27th, 1922, at which time Major Toucey stated to me—
> "In France in war contracted some stomach trouble result of poor food, etc.—was indigestion—free from it over a year".
> Regret very much to hear this condition has returned and that Major Toucey is now permanently and totally disabled": Signed H. A. Baker, Medical Director.

Appellant states above and more appears on the two medical applications appellant signed November 27th, 1922, one with Dr. Baker and one with Dr. Ball, Dr. Ball dead before appellant filed with Veterans Administration. Dr. Ball examined appellant for stomach ulcers and so states on his application on same date, but as appellant had not been under a doctor's care within one year, no symptoms for one year, Kansas City Life sold appellant a $25,000.00 straight life policy in 1922. Today if anyone having stomach ulcers applies for insurance the Kansas City Life will go back to date of birth perhaps and doubtful if would sell such a person a policy, but in 1922 freedom for one year was sufficient.

Quote below affidavit made to Veterans Administration by Dr. E. L. Mathias, Medical Examiner for the Guaranty Life Insurance Company of Iowa, dated June 1st, 1936, quote:

> "This is to certify that on the 11th day of July, 1923, I examined Major S. R. Toucey: In my investigation

of his physical condition I developed the fact that he had been treated by Dr. George E. Richards, of Chicago, Illinois, in 1919 for gastritis. The details of his trouble were not entered into because it is not my duty to go further into the history of the case to obtain information. The Company can investigate. From what I understand about the case at this time it is very doubtful that he would have been issued standard insurance if the records of Dr. Richards had been available. Major Toucey made no effort to hide the fact he had had some stomach trouble and the declaration made to me by him, while not sworn to, is the equivalent of the same thing. Under the ordinary practice used by medical directors of life insurance companies, of which I happen to be one, it is our practice to make inquiry on stomach disorders within five years to ten years prior to examination. As this was overlooked in the underwriting department of the Guaranty Life Insurance Company no record was obtained from Dr. Richards and I understand the claim of Major Toucey depends on Dr. Richards or his records which are not now available. This is my knowledge of the facts in this case". Signed E. L. Mathias, M.D.

In 1923 appellant states the Guaranty Life of Iowa's rules and regulations went back six years for stomach disorders.

As appellant states on page thirteen of this petition, clause one, the New York Life had in their possession Kansas City Life 1922 policy, Guaranty Life of Iowa 1923 policy, both containing as their component part medical examination blanks signed by appellant personally, also medical examiners in 1922 and 1923. The New York Life, along with these 1922 and 1923 insurance policies in full force and effect (totalling $70,000.00 straight life insurance) also a 1905 Aetna straight life policy and a 1910 Aetna Health policy also in full force and effect.

On April 29th, 1924, the New York Life influenced appellant by fraud to cancel off the Kansas City Life and the

Guaranty Life of Iowa policies, advising appellant to keep the two Aetna policies as the Aetna provided a health protection in one policy. Appellant states the two Aetna policies ran in full force and effect until maturity, one in 1930 and the other in 1933 but it was the 1910 Aetna health policy to expire in 1930. The maturity on the Aetna 1905 Life in 1933 was used to pay New York Life $5,000.00 a year premium, appellant believes in 1932, borrowing against Aetna Life policy to do so.

The New York Life medical application signed by both appellant and medical examiner made on November 13th, 1923 (a component part of policy No. 8 611 895), speaks for itself. The New York Life in 1923 went back five years. Appellant had not been a patient under a doctor since under Dr. George E. Richards of Chicago spring of 1919, but the New York Life had the benefit of medical examinations made by the Kansas City Life in 1922 and Guaranty Life of Iowa in 1923. New York Life remained beautifully away from all medical examinations at Federal court 1936 trial, but the New York Life did not remain away from paying for and hiring hypothetical doctors to testify in their behalf, and did obtain the unethical hotel surgeon who operated upon the appellant for stomach ulcer protrusion April 1st, 1933, to also testify in their behalf. There is an angle on this which would not have been healthy for the New York Life had the Missouri State Court trial occurred March, 1938.

Doctor J. Frost of Chicago, Chief Surgeon for the Chicago & Eastern Illinois Railroad, Chicago Western Indiana Railroad, Chicago Belt Railroad, was doctoring the appellant and this hotel medical staff was fully aware of this. When the appellant was helpless they operated after 15 hours and did not advise Dr. Frost. Dr. Frost checked up appellant at his hotel, finding he had been taken in am-

bulance to hospital, rushed to hospital but it was too late. Operation had occurred.

Dr. Frost was a sick man when Federal trial occurred but wired appellant he would leave Chicago with a nurse in drawing room, day light train, desiring to testify morning of arrival.

Appellant wired Dr. Frost back not to come, not needed, nor did Dr. Frost make the trip from Chicago to Kansas City.

Appellant considered the official hospital report subpoeaned by Federal court more than sufficient to prevent any difficulty at trial, but somebody blocked that. See page #11 of this petition, second and third paragraphs.

Appellant states the foregoing which is only a terse history of the full record to show, had the New York Life not committed "fraud" on appellant by first obtaining their 1923 medical examination by "fraud", perhaps also committing "fraud" on their own medical examiner by not divulging to medical examiner the 1922 and 1923 medical examinations in 1922 and 1923 policies then in possession of New York Life sales force and had appellant remained with his 1922 and 1923 insurance there is little doubt this 1922 and 1923 medical examiner attitude would have in 1932 diagnosed the appellant's true condition and the April 1st, 1933 emergency operation would never have occurred.

Instead the New York Life forced upon the trade their life, health and accident policies whether the buyers wanted them or not before 1924, in 1924 until Missouri adopted its State established law on disability about 1926 when the New York Life stopped their unfair competition with other insurance, at least in Missouri for the time being, dragged their policy holders through court if one dared to file suit and in appellant's case doubly so and the whole scheme from the outset was to obtain a Federal court decision in disagreement with Missouri State established law on insurance

policy disability clause. Appellant states he was selected for the victim, that the Federal court was deceived to the end Federal court did render decision in disagreement with State established law and unnecessarily so. Appellant believes that the New York Life policy No. 8 611 895 he owned and paid for to be the same form policy, carrying the same terms of life, health and accident the New York Life used to stifle competition, force on the trade knowing other insurance its competitors could not meet any such competition and expect to meet policy obligation if such a policy holder became disabled from ill-health.

This is all a matter of proof also within the Veterans Administration's records on appellant.

Why would Mr. John Ready with the Mutual of Boston Insurance in greater Kansas City voluntarily go to the Veterans Administration and make sworn affidavit that in 1925 (within one year of date appellant bought New York Life policy No. 8 611 895 in 1924), that in 1925 he (Mr. Ready) called upon appellant at appellant's office, requested appellant to let him have New York Life Insurance policy No. 8 611 895 so that he (Mr. Ready) could analyze said policy and advise appellant if it contained a "health" clause and if so what were the full requirements of "health" clause and that appellant declined Mr. Ready's request, advising if ever appellant wanted to know anything about New York Life policy No. 8 611 895 that appellant would make his request on the New York Life? Mr. Ready did not testify at Federal court 1936 trial, I did not request Mr. Ready to testify, nor did the New York Life who knew all the particulars of this Mr. Ready 1925 call upon appellant.

This is all proof of a belief by some insurance competitive with the New York Life that the New York Life and unfairly did not meet honest insurance competition on an ethical basis and with form policy No. 8 611 895 only in later years, due to the State of Missouri adopting State

established law on insurance policy disability clause, the New York Life changed its methods.

That it did with the appellant and New York Life policy No. 8 611 895 is self-evident.

Appellant believes this other competitive insurance resent such unethical competition as practiced by the New York Life, resent insurance policy holders being dragged through the courts by the New York Life who repudiated its own policy obligation due to State established law, thus injured the insurance business generally and appellant firmly believes this, and this alone did prompt Mr. Edward G. Mura to testify before the Federal grand jury July 17th, 1940, on appellant's perjury charge and as the appellant also stated and testified as to the knowledge Mr. Edward G. Mura had in regard to possession of New York Life policy No. 8 611 895 June 29th, 1934. In addition Mr. Mura is an honest insurance executive, as is also Mr. John Ready and both can and could be counted upon to state the facts, and both never enjoyed one cent's worth of the appellant's insurance business since or before appellant started in business in Kansas City in 1919.

The colossal size and magnitude of the New York Life Insurance Company, the public prominence of its directorate (among which is to be found the Honorable Herbert Hoover and also the Honorable Alfred E. Smith) makes those in charge of the executive handling apparently believe the New York Life can still continue to exploit the people of Missouri as it did undoubtedly so exploit for more than fifty years before the adoption of Missouri State established law on disability as Missouri did so adopt its Missouri State established law on disability, I believe about 1926, to stop the exploitation of its citizens by such unethical insurance.

Then what did the great New York Life with appellant and with New York Life policy No. 8 611 895 do: it ob-

tained a Federal court decision in disagreement with State established law on disability and in Missouri and appellant here states not only to continue to exploit the citizenry of Missouri, but to continue to exploit State courts and juries as it did perhaps so exploit for fifty years or more before adoption of Missouri State established law. If not why so urgently want a change back?

Appellant states that on June 28th, 1934, when in personal contact with the Veterans Administration as set out in this petition page #18 on, appellant was only 30% disabled as a New York Life Medical Examiner, Dr. E. A. Albers, took appellant to the Veterans Administration on June 28th, 1934, and so advised the Veterans Administration: But being 30% disabled entitled the appellant to file two affidavits with Veterans Administration, and for appellant to also return to his business after a period of physical recovery and that appellant was returning to his business after July 4th, 1934, and had made such arrangement with his corporation of which he was an official both orally on June 26th, 1934, and in writing previous to this date so the record never could have been changed by appellant or anybody else.

But on July 3rd, 1934, and the Veterans Administration also holds this record, appellant unexpectedly met with a severe stomach hemorrhage: On July 3rd, 1934, the appellant lost all hope of returning to his business July 5th, 1934, and appellant so advised his corporation.

On June 28th, 1934, and also on June 29th, 1934, date New York Life policy No. 8 611 895 was put into possession by the New York Life, appellant was to return to work as best he could from his physical condition, pay the New York Life all premiums on policy No. 8 611 895 when due the same as in the past, that in June, 1934, all premiums had been paid to the New York Life in advance on policy No. 8 611 895 and three other New York Life policies totaling

$100,000.00 insurance and a yearly premium of $5,000.00 per year.

That on July 3rd, 1934, all premiums had been paid in advance on policy No. 8 611 895 and other three New York Life policies and all paid in advance for entire month of July, 1934, on policy No. 8 611 895 and other three policies.

That appellant's financial status was different after July 3rd, 1934, also the condition of his health than what it was on June 28th and June 29th, 1934: That in July, 1934, appellant could not pay the New York Life a yearly premium of $5,000.00 on policy No. 8 611 895 and other three policies when such premiums started to fall due in August, 1934.

Why did Cashier Shellhorn and Mr. Wells send Mr. McKinney to appellant's office later in July, 1934, Mr. McKinney not known to appellant? Why did Mr. Wells not return to appellant's office where Mr. Wells had called on June 29th, 1934, and left with appellant's four New York Life policies, among them policy No. 8 611 895? Why did Mr. McKinney when appellant asked why Mr. Wells had not returned the four policies by him in July, 1934, advise appellant actual policies were not needed to arrive at the cash surrender values of each policy as records on cash surrender values were kept on cards, not within the policy so policies were not needed?

Appellant testified to all these facts in Federal court trial and Mr. McKinney also testified at Federal court trial and did not deny a one of these facts as testified to by appellant.

Appellant also states that the Veterans Administration's records hold the proof that appellant suffered a stomach hemorrhage on December 6th, 1936, less than 15 days following close of Federal court trial, November 23rd, 1936, and was confined to his residence and bed for a long period.

Appellant states that on page #11 of this petition, the Honorable E. E. Koch, Clerk, Circuit Court of

Appeals, Eighth Circuit, is quoted the clerk of court's letter dated July 30th, 1940, to appellant listing documents now a part of the proceedings in this court: That appellant's letters to the Honorable Judge Merrill E. Otis in January and February, 1937, are so listed, also replies made thereto by his Honor to appellant.

That in appellant's letter dated February 5th, 1937, to the Honorable Judge appellant states in last paragraph thereof that Federal court's decision rendered November 23rd, 1936, could not be effectively appealed.

Appellant here states when writing the Honorable Judge on February 5th, 1937, appellant believed while the Federal court did issue and serve subpoena on Veterans Administration Wadsworth, Kansas, hospital to produce official hospital report dated Feby. 1st, 1936, on appellant as its patient said Federal court issued and served subpoena on said hospital carried a misspelled name for the Clinical Director on whom Federal court subpoena was to be served morning of November 18th, 1936, and that due to such misspelled name Federal court subpoena had not been served on this hospital or its Clinical Director.

When appellant was able to leave his residence following stomach hemorrhage December 6th, 1936, that appellant did leave his residence in June, 1937, and personally visited the Wadsworth, Kansas, Hospital in question and contacted hospital authorities and discovered that Federal court issued and served subpoena drawn in the name of Wadsworth Hospital, Wadsworth, Kansas, Clinical Director, C. A. Yokley, was served and personally served on the morning of November 18th, 1937, on Wadsworth Hospital, Wadsworth, Kansas, and personally on Clinical Director, Dr. C. A. Yokley.

That on June 9th, 1937, appellant made written report to General Frank T. Hines, Administrator of Veterans Affairs, Washington, D. C., demanding appellant be given

certified copy of hospital report dated February 1st, 1936, and reporting to General Hines Wadsworth, Kansas, Hospital, particularly Clinical Director C. A. Yokley, were a disgrace to the Veterans Administration for this wilful act of injuring a veteran by withholding official hospital report so badly needed as evidence before a Federal court trial in session when subpoena served and on Clinical Director, C. A. Yokley, of hospital morning of November 18th, 1936, and both the Hospital and Clinical Director, C. A. Yokley, M. D., had ignored Federal court subpoena: That General Frank T. Hines himself knew in August, 1936, the necessity by appellant to have official certified copy of hospital report in question dated February 1st, 1936, and for Federal court trial evidence.

That General Frank T. Hines instructed hospital to furnish to appellant certified copy of official hospital report, and that Wadsworth Hospital, in July, 1937, did so furnish certified copy of hospital report to appellant nine months after Federal court trial closed, November 23rd, 1936.

Appellant states that the first notation made on this official hospital report dated February 1st, 1936, and by the nurse in receiving ward under doctor's orders proves why the appellant suffered stomach hemorrhage December 6th, 1936, within 15 days following close of Federal court trial, November, 1936.

Appellant states that this Veterans Administration official hospital report by taking any one page therefrom at random is proof the Federal court had no legal right to disagree with Missouri State established law on insurance policy disability clause; and also that the Federal court never had a legal right to so disagree with or without this official hospital report before the Federal court as evidence, but that Wadsworth Hospital deliberately ignored Federal court issued and served subpoena and did not produce offi-

cial hospital report before Federal court trial as evidence and that appellant believes such hospital action not to be due to ignorance, but deliberate and because said hospital report was not desired by someone to be in record of Federal court trial and thus not available to refer to if appellant was forced to take an appeal on decision rendered. That the Federal court was deceived in the whole conduct of trial held, that appellant put proof before the Federal court appellant's Federal court subpoenaed witness had been interfered with by an officer of the New York Life during session of trial but that this proof was ignored by Federal court who denied motion for rehearing only for same Federal court to inject Federal court temporary injunction stopping State court jury trial, March, 1938.

Appellant states that Federal court's final decree entered August 14th, 1939, instructing Marshal to take from appellant, physically if necessary, New York Life policy No. 8 611 895 is strong legal language and to justify same appellant could only be considered with such order appearing within Federal judiciary records as an undesirable citizen: That appellant has made search and can find no justification for such a Federal court's final decree to be entered:

That appellant had never been in a court trial in his entire life until filing suit in equity in State of Missouri court against the New York Life on policy No. 8 611 895, October, 1935.

That this was the suit in equity tried before Federal court without jury, November 18th to 23rd, 1936.

That appellant had been a heavy buyer of insurance policies starting with the Aetna Life policy in 1905 and that for the period of 1905 to October, 1935, when suit in equity was filed against the New York Life in Missouri State court appellant had never made claim against any insurance previously to 1905, since 1905 or until October, 1935, but ap-

pellant buying insurance heavily in his railroad supply business from 1919, buying insurance heavily for himself personally and of all types personally only one insurance company ever paid appellant a claim and voluntarily so (amount not exceeding $100.00) and that insurance company to be the Aetna Insurance Company whose first policies the appellant bought in 1905.

That such a Federal court final decree as entered August 14th, 1939, was unjustified; that such a Federal court order entered September 26th, 1940, citing appellant for contempt of court because Marshal had not destroyed New York Life policy No. 8 611 895 was unjustified:

That appellant is thus forced in this his petition for writ of certiorari to the Supreme Court of the United States to state the following facts without comment and then to continue in this petition with the court proceedings to which petition refers the mention of which was interrupted by appellant starting with page #17 of this petition to put before the Supreme Court why New York Life policy No. 8 611 895 should not be destroyed by "law" and the necessity by appellant for policy No. 8 611 895 for evidence before the Federal grand jury in his perjury charge against New York Life officials in Federal court, and also for evidence before Veterans Administration to throw out from the records on appellant (also a veteran) New York Life medical examinations obtained by "fraud" a photostatic copy of one being a component part of policy No. 8 611 895 to be destroyed by "law".

The Kansas City Star, and greater Kansas City morning and evening newspaper addition, Sunday, February 7th, 1937, under large type front page caption appears, quote:

LAWYERS DON'T LIKE IT.
PRESIDENT'S COURT PROPOSAL CRITICISED WIDELY HERE.

QUOTES THE FIRM OF NEW YORK LIFE ATTORNEYS GEORGE J. MERSEREAU.

"Most revolutionary act the President has advanced so far; untimely; not in keeping with general idea of our form of government; I can't believe any thinking man would approve of it; I have talked with twenty or more lawyers and I have yet to find anyone who approves of it, lawyer or layman."

The same Kansas City Star in issue of February 12th, 1937, under largest sized front page caption, with photograph of the most Honored Citizen and Federal Judge states, quote:

"A COURT SCREEN"

JUDGE OTIS ASSERTS PRESIDENT'S MESSAGE TO CONGRESS ON FEDERAL JUDICIARY WAS "CAMOUFLAGE" NEVER SO FAR AHEAD: ATTORNEY GENERAL CUMMINGS' OWN REPORT QUOTED AS PROOF THERE IS NO JUDICIAL DELAY: ACT OF CAESAR RECALLED: ROMAN SENATE NEVER REGAINED POWERS IT TEMPORARILY GAVE AUGUSTUS, JURIST POINTS OUT.

"Federal Judge Merrill E. Otis today left the bench where strictly legal interpretations are the rule and, for the benefit of the Real Estate Board, applied himself to an interpretation of President Roosevelt's Supreme Court message. He went back to the world war to find a word for it—'camouflage'. Camouflage he said he had discovered by reference to Webster means 'The disguising of a camp, battery, arsenal, ship, etc., as by paint, screens, shrubbery or the like, to reduce its visibility or conceal its actual nature from the enemy'. Before Judge Otis finished his talk one dis-

covered he meant that under the guise of speeding up justice in federal courts, President Roosevelt had set up a plan to 'Pack the Supreme Court' and that was 'Camouflage'. What Judge Otis objected to was the premise laid for the packing. It all seemed to be based upon a letter which Attorney General Cummings sent to the President February 4th, and Judg. Otis quoted from it:

> " 'My Dear Mr. President: Delay in the administration of justice is the outstanding defect in our federal judiciary system. * * * It has exasperated the bench, the bar and the public. * * * The evil is a growing one. The business of the Courts is continually increasing. * * * The time has come when further legislation is essential'. At that point Judge Otis produced a chart he had had drawn which illustrated visually the business of the federal courts in recent years. And he bulwarked that chart with quotations from an annual report he received two weeks ago from Attorney General Cummings written, it seems, in a moment of pride over the federal judiciary; that was issued prior to the night of February 4th when Attorney General Cumming. wrote the letter to the President— 'Delay in the administration of Justice is the outstanding defect of our federal judiciary system. The evil is a growing one'. (Judge Otis then continues, but I quote one important statement and skip over some three newspaper columns of the jurist's comment). That report was no surprise to me, Judge Otis said. 'For years the legal profession has pointed to the Supreme Court of the United States as the great example for all courts to follow, as the one court of all where there was no delay, where the work was done, where every case ready for submission was disposed of before the term ended, even though six of the nine jurists, so it has been intimated, are pitiable objects of senility.' No, Judge Otis said, it cannot be what the President seeks is speedy justice because now

there is no delay. So Judge Otis looks behind the screen and shrubbery. When we have lifted them away, he said, to discover what it is whose actual nature it was sought to conceal, not indeed from the enemy, but from America, what is it that we find? I answer not in my own words, but in the words of a thousand screaming headlines published by a press that still is free: Quote the headlines: You have read the answer—'Pack the Supreme Court.'"

Article too lengthy to quote more here.

Appellant states that bank presidents have used their bank financial monthly prospectus to charge President Roosevelt "Packed the Supreme Court of the United States" in his own image; that The University Bank of greater Kansas City and personally by its President, Mr. J. R. Breed, has for months been so utilizing the bank prospectus. That appellant and Bank President J. R. Breed have been exchanging friendly letters in diametrically opposite political philosophies. That appellant has favored President Roosevelt with both such bank prospectus and letters so interchanged which have been acknowledged. That appellant also has favored Attorney General Jackson similarly and Mr. Jackson has acknowledged personally, etc.

That on October 18th, 1940, President Breed of the University Bank favored appellant with the latest issue of his bank prospectus largely devoted to President Roosevelt "Packing the Supreme Court" and that on same date appellant wrote President Breed as follows, favoring President Roosevelt with copy (acknowledged by Stephen Early) and also favoring Attorney General Jackson and acknowledged personally by Mr. Jackson.

That there was organized in Jackson County, Missouri, which embraced greater Kansas City an association known as the Employers Liability Association; that the associa-

tion members comprised the large corporate and individual employers of labor, etc. That this association was, some time back, advertised in the press with big sounding names and for big sounding public benefit:

That one of the prominent members of this association and one of its organizers was a Mr. Heath Moore, a New York Life department head in greater Kansas City:

That the time had arrived to give the Rooseve't "Packed Supreme Court" a rest in the bank prospectus perhaps if President Breed would investigate this association as its original purpose seems to have been to "Pack the jury boxes in Jackson County, Missouri, State courts also embracing greater Kansas City." That if Mr. Breed would investigate this association appellant felt quite sure he could devote his bank prospectus on the next issue to the Employers Liability Association and its purpose:

That the members of this association employed in the neighborhood collectively of over fifty thousand (50,000) employes: That it seems the sheriff of Jackson County, Missouri, would call on association members, leave a large supply of cards: That such members would fill in such cards with the names of their employment: That the sheriff would then again call and collect such filled in cards, go over to the Jackson County Court House and throw this volume of cards filled out by the association members with names of their employes into the Jackson County, Missouri, Jury Wheel: That the jury wheel of Jackson County, Missouri, listed approximately slightly over sixty thousand (60,000) names; that the approximate employment of association members was, as stated, fifty thousand employes (50,000) so thus the Jackson County Missouri, jury wheel, if all this were true, had been "packed" by association members and "packed" for a long time and was still so "packed" and there was no argument why it was so "packed" as the asso-

ciation members paid their employes their regular salaries when drawn for jury service and while serving on juries:

That appellant had learned within the last month a lawyer in Kansas City representing a client appeared before a Jackson County, Missouri, court, requested a change of venue in a civil suit, a court trial was held to submit the issue and the charge was due to the activity, as stated, by this association it was believed a "fair" jury trial was not possible in Jackson County, Missouri, courts and the client of lawyer requested a change of venue be granted and for the purpose as stated herein by appellant so that trial could occur at a point outside of Jackson County, Missouri: That the court was then considering the matter: That appellant would be glad to advise President Breed all particulars, name of lawyer, etc., to investigate and if true, put in bank statement prospectus as if true it was *Treason* against the Constitution of the United States, *Treason* against Democracy and *Treason* against the Constitution of the State of Missouri: Appellant states President Breed has not, as yet, indicated his intention: That a Kansas City Star reporter, appellant understands knew all about these facts. No mention made of it at all in Star so far as appellant can find to date.

The late greatly Honored Jurist (Justice Cardozo of the United States Supreme Court) said—quote—

> "It is the duty of a Judge to objectify in law, not the Judge's own convictions, ambitions and philosophies, but the convictions, ambitions and philosophies of the spirit of his time".

Appellant believes the first thirteen (13) States first rejected the Constitution for the reason they believed such a colossal Federal government with the one court might not render justice to the State citizen; that then followed the first ten amendment to the Constitution known as the

"bill of rights" when the thirteen (13) States adopted the Constitution:

That if for a period of over fifty years State courts of Missouri were publicly charged with "Insurance Corruption" by the power of the State citizens vote judges finally were put upon State court benches to give the answer, adoption of "State established law governing legal disputes on the disability clause of insurance policies", Missouri so adopting State established law on disability:

Appellant believes also that Federal court was deceived by defendant, influenced to render decision in disagreement with Missouri State established law on disability and that such decision could be but a "tortured" construction of the Constitution as reflected in Federal court decision rendered:

That the Federal court had personal knowledge appellant's Federal court subpoenaed witness had been interfered with by one of defendant officials during session of trial; that this subpoenaed witness did not testify at trial as to his knowledge.

That the Federal court denied motion for rehearing supported by affidavit setting out such facts so subpoenaed witness could not testify as to his knowledge and be in record of trial on which to base an appeal on decision rendered:

That Federal court had personal knowledge doctors and nurses (official hospital report on appellant dated February 1st, 1936) likewise subpoenaed by Federal court to appear, be produced as evidence before trial; that the doctors, nurses (official hospital report) did not so appear, nor was so produced before trial, nor all in record of trial to be used to base an appeal on decision rendered:

That Federal court had personal knowledge appellant would not file an appeal on decision rendered following trial without such testimony rendered in record of trial, without such evidence by both subpoenaed witnes set out

in motion for rehearing as well as such witnesses and evidence set out otherwise before the Honorable Court and Jurist:

That Federal court knowing all this entered Federal court temporary injunction (March, 1938) stopping State court jury trial, the same suit as filed in State of Missouri Court, October, 1935, refiled by appellant in same State Missouri Court December, 1937, and in a form to hold the suit to State of Missouri Court for trial so that the subpoenaed witness, the subpoenaed witnesses (official hospital report) could not appear and testify as to their knowledge and regardless of why such Federal court subpoenaed witnesses and evidence did not appear and testify at Federal court trial (November 18th to 23rd, 1936) it was always fully intended under the Constitution and all laws enacted thereunder justice should never be defeated by denying appellant first a "fair" trial, then let the decision be what it may and that the Federal court was in error in entering Federal court temporary injunction, Federal court permanent injunction and court's final decree (August 14th, 1939) and thus defeated justice by first denying motion for rehearing, then denying appellant the right to trial in his own State Court of Missouri by the injection of Federal court injunctions and court's final decree under which the Marshal was to take away from appellant, by physical force if necessary, and destroy New York Life policy No. 8 611 895.

Appellant prays the Supreme Court of the United States to take jurisdiction on appellant's writ of certiorari and go into the above entitled case fully:

Appellant now continues with his recitation of Court proceedings abruptly cut off by appellant on page #17 of this petition to pray to the Supreme Court of the United States Federal court's citation of appellant for contempt of court

entered on September 26th, 1940, due to court's final decree entered August 14th, 1939, may not result in the "law" destroying New York Life policy No. 8 611 895 and to set out the two urgent needs for policy No. 8 611 895 as evidence before two other governmental bodies to prove 1923, 1924 as well as June 29th, 1934, possession of policy No. 8 611 895 and all the "fraud" proven by said policy from 1923 to 1934 and its component parts, practiced and wilfully perpetrated upon appellant with malicious intent by defendant.

On September 30th, 1940, appellant appeared before the Honorable Court as ordered September 26th, 1940, when appellant withdrew motion and Federal court dismissed order in citation for contempt of court.

On October 3rd, 1940, appellant petitioned Circuit Court of Appeals Eighth Circuit praying for an additional extension of time from date of judgment (July 22nd, 1940) or for four months or until November 21st, 1940, to file writ of certiorari with the Supreme Court of the United States.

On October 4th, 1940, the Honorable E. E. Koch, Clerk, Eighth Circuit Court of Appeals advised appellant and quoted the law governing Circuit Court of Appeals Eighth Circuit which did not permit the Court to act upon appellant's petition, the petition by appellant being returned to appellant by the Honorable E. E. Koch, Clerk, Circuit Court of Appeals Eighth District.

On October 8th, 1940, appellant petitioned the Supreme Court of the United States quoting letter appellant received from the Honorable E. E. Koch, Clerk, Circuit Court of Appeals Eighth Circuit, dated October 4th, 1940, advising appellant's petition entered October 3rd, 1940, had been returned without court action, the law not permitting the court to act, praying for an additional extension of time as granted by Mr. Justice Douglas in order entered September 25th, 1940, granting to appellant until November 21st, 1940, to file writ of certiorari with the Supreme Court

of the United States, appellant asking and praying order be entered granting appellant a thirty (30) day additional time to file writ of certiorari beyond November 21st, 1940. Appellant stated it seemed to appellant it was a race as between the Marshal destroying New York Life policy No. 8 611 895 on order entered by Federal court August 14th, 1940, or appellant filing writ of certiorari with the Supreme Court of the United States, appellant being tied up as a witness before the Federal grand jury on appellant's perjury charge against two officers of the New York Life who denied possession of New York Life policy No. 8 611 895 in their Federal court trial testimony and that appellant required New York Life policy No. 8 611 895 for evidence before Federal grand jury, etc.

On October 10th, 1940, The Honorable Charles Elmore Cropley, Clerk, the Supreme Court of the United States (by E. P. Cullinan), advised appellant by letter application was presented to Mr. Justice Reed who declined to act upon application for a further stay as it did not appear the Circuit Court of Appeals, Eighth Circuit, had been presented appellant's petition to act upon same.

On October 18th, 1940, appellant petitioned the Supreme Court of the United States requesting certified copy of order entered by Mr. Justice Douglas be mailed direct to The Honorable E. E. Koch, Clerk, Circuit Court of Appeals, Eighth Circuit; and praying that the Supreme Court of the United States grant to appellant an additional extension of time beyond the additional time entered by Mr. Justice Douglas' order dated September 25th, 1940, granting to appellant until November 21st, 1940, to file writ of certiorari: That if a thirty day extension of time was granted by order entered by Supreme Court to forward to The Honorable E. E. Koch, Clerk, Eighth Circuit Court of Appeals direct new order entered; or if petition denied, to mail

direct to Clerk, Circuit Court of Appeals, Eighth District certified copy of order entered by Mr. Justice Douglas September 25th, 1940, granting extension of time until November 21st, 1940, to file writ of certiorari:

On October 22nd, 1940, the Honorable Charles Elmore Cropley, Clerk, the Supreme Court of the United States (by E. P. Cullinan), advised appellant by letter that certified copy of order entered by Mr. Justice Douglas September 25th, 1940, granting until November 21st, 1940, to file writ of certiorari with the Supreme Court of the United States had been forwarded to Clerk, Circuit Court of Appeals, Eighth Circuit; that it was not permitted under the law to grant a further extension of time to file writ of certiorari:

On October 25th, 1940, the Honorable E. E. Koch, Clerk, Circuit Court of Appeals, Eighth District, advised appellant order had been entered by his court granting extension of time until November 21st, 1940, to file writ of certiorari with the Supreme Court of the United States, enclosing copy of order:

On October 25th, 1940, appellant wrote The Honorable Charles Elmore Cropley, Clerk, the Supreme Court of the United States quoting letter from The Honorable E. E. Koch, Clerk, Circuit Court of Appeals, Eighth District, under date of September 18th, 1940, from which it would appear, under the law, the Supreme Court of the United States might grant an additional extension of time, for thirty days beyond November 21st, 1940, as per order entered by Mr. Justice Douglas on September 25th, 1940. Appellant set out appellant had finally appeared before the Federal grand jury for ten minutes on October 24th, 1940, that Federal court exhibits were in the possession of the District Attorney, had been mislaid, was doubtful how much more appellant would be delayed obtaining exhibits or by the Federal grand jury and doubtful when could properly

compile writ of certiorari under circumstances to the Supreme Court of the United States; in fact the Acting District Attorney (Mr. Victor K. Phelps) suggested to appellant he request the Supreme Court of the United States for an additional extension of time and appellant now states this herein.

On October 29th, 1940, the Honorable Charles Elmore Cropley, Clerk, the Supreme Court of the United States (signed E. P. Cullinan), advised appellant application for an additional extension of time to file petition for writ of certiorari was presented to Mr. Justice Douglas and the Justice denied application and quoted the Justice's entry—quote—"Denied without prejudice to renew the motion with additional affidavits as to the then condition after November 15th, 1940."

On October 30th, 1940, appellant advised the Honorable Charles Elmore Cropley, Clerk of the Supreme Court of the United States, that District Attorney (Acting Attorney, Mr. Victor K. Phelps) had returned to appellant Exhibit #23 and advised that Exhibit #5 would be returned to appellant, and which contains component parts of New York Life policy No. 8 611 895 Exhibits with policy before Federal court trial, while still misplaced in District Attorney's office should be returned to appellant on October 30th, 1940, so no further extension of time for appellant to file writ of certiorari with the Supreme Court of the United States beyond November 21st, 1940, seemed necessary and that appellant would file writ of certiorari with the Supreme Court on or before that date.

On November 2nd, 1940, the Honorable Charles Elmore Cropley, Clerk, the Supreme Court of the United States advised appellant (signed E. P. Cullinan) copy of order by the Circuit Court of Appeals, Eighth Circuit, staying the issuance of mandate in above entitled case had been received.

PETITION FOR WRIT OF CERTIORARI.

Appellant directs attention to *Statement, Brief* and *Argument for Appellee* appearing in the certified record in the above entitled cause. Quote:

> "The decree below should be affirmed because the issues raised on this appeal have been expressly ruled against plaintiff on his first appeal and therefore constitute the law of the case".

Appellant has a conviction that this is the *strongest argument* advanced by defendant: That any and all attempts by defendant to *cite precedent cases* justifying the federal court had legal right to enter temporary injunction stopping state jury trial (March, 1938) is conspiciously lacking.

Appellant states in the light of the fact that it has been said "A citizen cannot remain in Federal Judiciary Courts to obtain justice due to the high costs", that the so called *Strong Argument* by the defendant as quoted proves to be its *Weakest*, in fact no argument at all:

That when the *trial court* found there was *no fraud nor concealment*, there was *nothing left* (In a case in Equity) for it to *act upon* except the *claim* of *disability benefits*, and on that *cause of action* there was a *plain, adequate* and *complete remedy at law*, and the *dismissal* of the *bill in equity* was, in *law, without prejudice* to a *subsequent action in law*

That if the *opinion* of the Circuit Court of Appeals Eighth Circuit in this case is to stand *Section* 379, *U.S.C.A.*, 28, does not *mean what it says*, there is *no limitation upon the right of a federal court* to *stay proceedings* in a *state court* and that *Section of the Statutes Means Nothing, Has Been Repealed, and Is a Dead Letter.*

That the Supreme Court of the United States has thus been *overruled by lower courts;* that the first thirteen (13)

States only influenced to adopt the *Constitution* following the first *ten amendments* thereto (*bill of rights*) to guard against a *state citizen* being *denied justice* within the *federal judiciary* has *miserably failed.*

The action was *In Personam* in above entitled cause: The public charge *"Delay in the Administration of Justice was the Outstanding Defect in our Federal Judiciary System; the Evil was a Growing One"* here stands proven by federal court decision and the full concurrence therein by the Circuit Court of Appeals Eighth Circuit: That the same federal court, the same Circuit Court of Appeals Eighth Circuit (sitting as a three-judge federal court) were deceived by 137 different insurance companies with resultant exploitation of policy holders in the name of the "law" just previous to the Federal Court entering temporary injunction stopping state court jury trial in above entitled cause, and appellant in the strongest language capable of his command charges to the Supreme Court of the United States that the same two lower Courts have been again deceived and by the defendant in the above entitled cause even to the extent of influencing the federal court to enter court's final decree ordering the Marshal to destroy New York Life policy No. 8 611 895 in the name of the "law" and for a reason plainly apparent by policy and its component parts within themselves as proof. Even beyond this citing appellant by court order for contempt of court because Marshal had not so destroyed New York Life policy No. 8 611 895. A full four day trial.

1). Less than one day was consumed by federal court in Equity trial to rule "No fraud by defendant June 29th, 1934" was committed on appellant.

2). More than three days was consumed by federal court to determine if appellant was "Permanently and totally disabled for his regular line of work": Decision rendered ruled that appellant was found to be so dis-

abled; but the same decision ruled appellant "could do some other kind of work"

Appellant states such a federal court trial and decision does not make legal sense in the light of the Constitution: nor common sense.

Appellant's Reasons Relied Upon for the Allowance of the Writ.

The Circuit Court of Appeals in holding that a Court of Equity may, after determining the equitable issues adversely to the petitioner, determine legal issues, has denied justice and has decided an *important* question of federal law which holding is in *conflict* with applicable decisions *rendered by the Supreme Court of the United States with its own prior decisions:*

Dowell v. *Mitchell*, 105 U. S. 30?, 26 L. Ed. 1142.

American Falls Milling Company, v. *Standard Brokerage & Distributing Company*, 248 Fed. 487 (8th C. C.A.)

Linden Investment Co., v. *Honstain Brothers Co.*, 221 Fed. 178 (8th C. C. A.)

The Circuit Court of Appeals has held that a Federal court, notwithstanding the prohibition of Section 265, Judicial Code, Section 379, U. S. C. A., Title 28, may stay proceedings in an *action in personam* in a State court, and in so holding has decided an important question of Federal law, and such holding is in *conflict* with applicable decisions of the Supreme Court of the United States and with prior decisions of the Circuit Court of Appeals for the Eighth Circuit which latter court has so far ignored the plain meaning and intendment of that statute as to call for the Supreme Court of the United States power of supervision:

Kline v. *Burke Construction Co.*, 260 U. S. 226, 67 L. Ed. 226, 24 A. L. R. 1077;

Armour & Co. v. *Miller*, 91 F. (2d) 521 (8th C. C. A.);
W. E. Stewart Land Company v. *Arthur*, 267 Fed. 184 (8th C. C. A.);
Desha County v. *Crocker*, 72 F. (2d) 359 (8th C. C. A.).

Statement of Basis on Which the Jurisdiction of the Supreme Court of the United States is Invoked.

(a) *Statutory provision believed to sustain the jurisdiction.* The jurisdiction of the Supreme Court of the United States is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13th, 1925, Chapter 229, Section 1, 43 Stat. 938 (28 U. S. C. A. 347a), and under the same act, Chapter 229, Section 8, 43 Stat. 940 (28 U. S. C. A. 350).

(b) *The date of the judgment sought to be reviewed.* The judgment of the Circuit Court of Appeals affirming the judgment of the District Court was entered June 29th, 1940, and petitioner's petition for a rehearing was denied July 22nd, 1940. The petition for writ of certiorari and supporting certified transcript of the record (to be furnished by the Circuit Court of Appeals, Eighth Circuit, to Supreme Court of the United States) was granted an extension of time (four months from date of judgment, July 22nd, 1940), or until November 21st, 1940, by order entered by Mr. Justice Douglas of the Supreme Court of the United States, September 25th, 1940.

The Questions Presented.

ONE:

Do the provisions of Section 379, Title 28, U. S. C. A., Section 265, Judicial Code, prohibit a *Federal court* from staying proceedings in an *action in personam pending in a State court?*

Two:

Does a Court of Equity, upon determining the equitable issues adversely to the petitioner, *lose jurisdiction to adjudicate legal issues?*

1). It is clear that the original action in above entitled cause was in equity to avoid the reduction in the amount of New York Life policy No. 8 611 895, and to procure a reinstatement of that policy was an *Action in Personam.*

Whether petitioner might have had judgment in that case did not depend upon proof by him of total disability for, upon proof of fraud in the procurement of the lapse of the policy, petitioner would have been entitled to a decree of reinstatement in the original amount (or reduced amount) conditioned upon payment of premiums, regardless of disability.

In Couch, Cyc. of Ins. Law, Par. 1429, Vol. 6, it is said:

> "* * * So, it is held that for a wrongful cancellation for nonpayment of premium, the plaintiff was entitled to have the policy declared in force, but that it should also be adjudged that the premium due, with proper interest, be paid".

It is clear an action in equity draws to it all issues, equitable and legal, essential to complete adjudication of the issues between parties. As a concomitant of the rule, it is clearly established that when a *Court in Equity* determines the equitable issues adversely to the petitioner, whether for lack of proper averment or lack of proof, that *Court* loses jurisdiction to determine the legal issues.

It is clear in above entitled cause that when the Federal court ruled there was no fraud committed upon appellant by defendant as to terms of New York Life policy No. 8 611 895, in a suit in equity, there was nothing left for it to act upon but the policy clause governing disability, and

on that cause of action there was a plain, adequate, and complete remedy at law, and a Federal court should have dismissed the bill without prejudice to an action at law.

2). When petitioner entered Circuit Court of Jackson County, Missouri, December, 1937, and filed petition in suit against defendant, it was clearly an *Action in Personam* in which nothing more than a personal judgment was sought. There is and can be no objection to a subsequent action either before or after judgment, and this because the subsequent action neither ousts the jurisdiction of the Federal court in which the action was first brought, nor does it delay or obstruct the exercise of that jurisdiction, nor lead to a conflict of authority where each court acts in accordance to law and where the actions, as here, are *in personam*. It is thus clear under the Constitution and laws thereunder a judgment in one court may be pleaded in another court, and the effect of the judgment is to be determined by the application of the principles of *res adjudicata* by the court in which the action is still pending, in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law.

In the face of the foregoing questions one and two, this petition for writ of certiorari quotes the first written opinion handed down by Federal court to justify entering temporary injunction stopping State court jury trial (March, 1938), permanent injunction, and court's final decree (August 14th, 1939), and in the name of the Constitution and laws thereunder, viz:

Memorandum Opinion on Motion to Dissolve Temporary Injunction by District Court, Judge Otis.

> "While I said at the argument of this motion that if I reached the conclusion that the motion should not be sustained no opinion would be written, yet I think I should briefly indicate the reason which leads me to

adhere to my original conclusion, notwithstanding the very able argument offered by *amicus curiae*.

I am convinced that the restraining order rightly was issued. I consider that the principle of law justifying it is that repeatedly stated by the Supreme Court. Thus, in Root *v.* Woolworth, 150 U. S. 401, 411, it was said:

> "The jurisdiction of Courts of equity to * * * effectuate their own decrees by injunctions * * * in order to avoid the relitigation of questions once settled between the same parties, is well settled."

Nothing in this declaration of principle limits it to matters *in rem* as distinguished from those *in personam*.

The same principle of law was declared by the Eighth Circuit Court of Appeals in Guardian Trust Company *v.* Kansas City Southern Railway Company, 146 Fed. 337, 340. In the opinion in that case Judge Sanborn pointed out that the principle did not justify the issuance of an injunction against the prosecution of a case in a state court if the state court case *neither* involved a claim to or lien upon specific property in the possession or under the dominion of the federal court *nor* an issue of which the federal court had acquired exclusive jurisdiction. In the particular case the issue involved in the state court was not at all adjudged in the federal court case in which the injunctive remedy was sought.

The case of Kline *v.* Burke Construction Co., 260 U. S. 226, cited by Counsel, does not appear to me to be at all in point. It was not a case which involved the jurisdiction of a federal court to protect its decree in an equity proceeding. It was a case in which it was sought to protect the jurisdiction of the federal court in a law case by preventing the trial (not of the same case, but of another case) in a state court, of which the state court had jurisdiction. The Court of Appeals for the Fourth Circuit, in an opinion written by Judge Parker (Brown *v.* Pacific Mut. Life Ins. Co., 62 Fed. (2d) 711, 713) expressly ruled that the doctrine of Kline

> *v.* Burke Construction Co. had 'nothing in it which limits to action *in rem* the rights of a federal court of equity to protect against encroachment on its jurisdiction or the lawful effect of its orders and decrees * * *. The motion to dismiss the injunction is overruled. It is so ordered." Signed, Judge Otis, District Judge:

It surely is the right of appellant and from the record to point to the fact Federal court received above entitled case first by transfer in suit in equity filed in State court (October, 1935), tried suit in equity in Federal court and rendered Federal court decision (November 23rd, 1936), and in the issues *in equity* decreed that defendant had committed *no fraud* on appellant on June 29th, 1934, by deceiving appellant as to the true terms of New York Life policy No. 8 611 895. That the suit in equity thus tried by Federal court was an action *in personam;* that same suit filed in State court December, 1937, was an action *in personam.* That by the same decision rendered by Federal court November 23rd, 1936, Federal court ruled on disability of appellant and under the disability clause in New York Life policy No. 8 611 895 and by such decision disagreed with State established law on disability in Missouri State courts.

That the above quoted initial opinion by the Federal court in above entitled cause makes no reference or citation to a single one precedent case justifying Federal court to enter temporary injunction stopping State court jury trial (March, 1938) and also that there has not been a clear cut precedent case cited in any and all opinions since written by the Federal court in the long years of litigation as a result of Federal court entering this temporary injunction stopping State court jury trial (March, 1938) nor that in the numerous briefs, petitions, etc., injected by defendant in such litigation, either before the Federal court or before

the Circuit Court of Appeals, Eighth District, does there appear a single one precedent case cited to justify the Federal court entered injunctions and court's final decree (August 14th, 1939) while the petitions, briefs, arguments, etc., by appellant's counsel clearly quotes, mentions and points to precedent cases thus cited which clearly show the Federal court was not justified under the Constitution and any and all laws ever devised thereunder to enter injunction stopping the State court jury trial with the action *In Personam.*

Furthermore as the Constitution of the United States is thus under such legal discussion and before the Federal Judicial body itself whose laws must state "What the Constitution intends" as the first thirteen States (13) first rejected the Constitution, and only adopted the Constitution following the first ten (10) amendments thereto known as the "Bill of Rights" appellant most emphatically states at no time, no place and nowhere since the dawn of American Democracy has a Federal court "Had a right to disagree with State Established law governing the insurance policy disability clause on disability" yet the Federal court writing the opinion above quoted did so disagree with State law, then in an action clearly *In Personam* entered Federal court injunction stopping State court jury trial and without quoting one single law ever written under the Constitution of the United States simply because there was and is no such law under the Constitution; and if there had so been Federal court surely would have so quoted in its opinion above quoted or subsequent opinions entered.

On page #4 of this petition, clause four, excerpt of Federal court November 23rd, 1936, rendered decision is quoted in reference to two letters written and mailed by appellant to defendant, addressed to the New York Life Home Office, New York City. One such letter as mentioned in record

dated June 29th, 1934, is now quoted in full, viz. (quoted from manifold carbon):

S. R. Toucey,

715 Midland Building.

Kansas City, Mo., June 29th, 1934.

New York Life Insurance Company,
New York City, N. Y.

Gentlemen:

The Veterans Administration of this City, or the government's War Department at Washington, will make request on you sooner or later for a full record of my examinations by you and which I purchased, as a result, all of which are now in force with premiums all paid. I think my first policy in the New York Life was taken out in 1922 and the last in 1928.

I am making request either on the Veterans Administration here or the Government at Washington shortly to be placed on the Retired Officers Emergency List. To qualify for this list one must be totally and physically disabled and I have been totally and physically disabled since my stomach operation for ulcers on April 1st, 1933. My examination a few days ago now develops I have a stomach hernia and will need another operation. I have discussed my case with Dr. E. A. Albers in Kansas City, one of your Medical Examiners, and he took me out and introduced me to the Veterans Bureau here. They advised me to write you at once if I intended to file application so that you would promptly give them my record when called for.

I presented myself to the New York Life medical department when a guest at the New Waldorf-Astoria Hotel in New York City, I think in November, 1932, advising that I had one hundred thousand dollars in New York Life Insurance, all in force with all premiums paid, and I wanted them to give me one of their most thorough examinations and, perhaps, more insurance. It took three, possibly four days to examine me

when I was advised I could have more insurance and to stop at the sales office down stairs on the way out. I advised if I wanted more I would ask for it at Kansas City upon my return. I have a faint recollection your New York office examined me some years previously when I was in New York City for some of my insurance now in force. I did not take out any more insurance, or ask for it on your 1932 examination.

I can't understand why my stomach would blow out or rupture in just a few months after this 1932 examination, particularly so as I was found in a most satisfactory physical examination condition. I do know it made me feel very good.

Please furnish the government with a record of my examinations when they call for them, and oblige:

(Signed) S. R. Toucey.

The record in above entitled cause mentions New York Life letters to appellant dated July 25th, 1934, August 10th, 1934, and appellant's further letter to the New York Life New York City office dated August 11th, 1934. All now quoted below:

New York Life Insurance Company.

Kansas City Branch Office.

Kansas City, Mo., July 25th, 1934.

Mr. Samuel R. Toucey,
714 Midland Building,
Kansas City, Mo.

Dear Mr. Toucey:

In accordance with our conversation I am giving you figures to discontinue $75,000 of your present insurance and continue $25,000 with disability and Double Indemnity Benefits.

To carry out this purpose it will be necessary that policy 8 611 895 which policy contains Disability and Double Indemnity be reduced to $25,000. The allowance due you on account of the $25,000 discontinued

will be sufficient to net you $329 in cash at this time after paying premiums in full on the policy to January 2nd, 1935. To make this change it will be necessary that the enclosed form 2274 be signed by you, your signature witnessed by some disinterested party and the request returned along with Policy Contract. It will not be necessary that your wife sign the form as I suggested during our conversation.

Policy 10 226 440 if surrendered at this time will net $717.31. The enclosed form of cash surrender value should be signed by you and dated and returned along with the Policy Contract.

Policy 10 391 096 is also to be surrendered at this time. The net cash value available under this policy will be $428.15 and you must sign the enclosed request for cash surrender value, date it and return it along with this Policy. These three policies will net you $1474.00 in cash at this time.

Policy 10 553 974 may then be surrendered on the next anniversary date, February 14, 1935, for a net cash value of $103.78.

If you decide to handle the entire matter in this manner you will have $25,000 of insurance in force charged with a loan of $8,000 leaving you net insurance of $17,000. There will be no more premiums due until January 2nd, 1935, at which time the premium will fall due on the $25,000 policy with the disability and Double Indemnity Benefits, and at that time you will have an annual dividend on that contract together with the cash value of $103.78 from policy 10 553 974, both of which amounts can be used to apply on the premium due at that time. The quarterly premium at that time on the policy continued will amount to $289.25.

We also find that there is not sufficient loan value in these policies to enable you to carry all of them without a cash payment to the first of the year.

Yours very truly,

L. C. SHELLHORN,
Cashier,
By M. M. MCKENNY.

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In lieu of the $1474.00 cash appellant was due to receive on August 10th, 1934, under terms of above quoted letter, appellant received still another New York Life letter dated August 10th, 1934, here quoted:

NEW YORK LIFE INSURANCE COMPANY.

KANSAS CITY BRANCH OFFICE.

Kansas City, Mo., August 10th, 1934.

Mr. Samuel R. Toucey,
715 Midland Building,
13th & Baltimore Ave.,
Kansas City, Mo.

DEAR MR. TOUCEY:

We are enclosing new trust agreement under policy No. 8 611 895 together with revocation of the existing trust. The Home Office has informed us that it will be necessary that you execute these new trust agreements before they can send us the changed policy.

During your telephone conversation with Mr. Wells and in my letter of July 25th we informed you that the allowance due you on account of the change under the $50,000 policy number 8 611 895 to $25,000 would be sufficient to pay the premium in full to January 2nd, 1935.

The Home Office has informed us that our figures on this matter are incorrect and that a cash payment of $231.06 will be necessary to complete the change and pay only the July quarterly premium on the $25,000 basis.

I am enclosing Mr. Wells figures on this policy and will ask that you note particularly that item which is "red lined". Instead of adding the premium on the changed basis to the outstanding loan, he through error deducted the premium from the outstanding loan, which means we over-quoted the value on this policy to you approximately $600.00. We are very sorry for this error on the part of our office and find that on checking

the matter over carefully that the Home Office is correct and that a cash payment of $231.06 is necessary to complete the premium on this policy. The Home Office has given us five days in which to collect this amount and it will be necessary that you send us a remittance of $231.06 along with the enclosed trust and revocation of the existing trust on or before August 15th.

We have not as yet received a cash value check for $428.15 on policy 10 391 096 from the Home Office, but just as soon as it is received it will be forwarded to you.

The cash surrender value on policy 10 533 974 will then be available on February 14, 1935, and will amount to $103.78.

Yours very truly,

L. C. SHELLHORN,
Cashier,
By M. M. McKENNY.

Appellant calls attention here to the record in above entitled case wherein defendant claims

> "On August 7, 1934, the sum of Seven Hundred Seventeen Dollars and thirty-one cents (717.31) being the full cash surrender value of policy No. 10226440, and the sum of Four Hundred Thirty Five Dollars and eleven cents (435.11) being the full cash surrender value of policy No. 10391096, and that appellant therefore accepted said sums as and for cash surrender values, etc."

The New York Life letter to appellant dated August 10th, 1934 (received by appellant on August 11th, 1934), signed by M. M. McKinny definitely states no cash surrender policy payments had as yet been made to appellant on that date, nor had any such cash surrender policy payments been made to appellant by the New York Life before or on August 11th, 1934, yet appellant was given until August 15th, 1934, to pay a premium on policy No. 8 611 895 said by New York Life letter dated July 25th, 1934, quoted above (also signed

by M. M. McKinney), *premiums* on New York Life policy *No. 8 611 895* were to be paid up in full *until January 2nd, 1935*, if appellant agreed to reduction in policy No. 8 611 895 and surrendered three other policies for cash value, receiving a check in cash for $1474.00.

The appellant here states the record in the above entitled case is contradictory, a poor record for appellant to be confined to show cause why the Federal court had no legal right to enter temporary and permanent injunctions, court's final decree to destroy policy No. 8 611 895, stopping State court jury trial (March, 1938) but does quote letters referred to and mentioned by Federal court decision as well as mentioned in record of case. And here quotes a letter written, mailed and addressed to the New York Life New York City Office (Home Office) on August 11th, 1934, and so written on request of Mr. M. M. McKenny made personally on appellant who explained to appellant that he (McKenny) would be embarrassed to write such a letter from the New York Life Kansas City Branch office as they (The New York Life Kansas City Branch Office) made the mistake on premium payments on policy No. 8 611 895. Nor did Mr. M. M. McKenny deny this in his testimony in Federal court trial. Quote—Likewise in record of above case:

S. R. Toucey.

715 Midland Building.

Kansas City, Mo., August 11th, 1934.

New York Life Insurance Company,
New York City, N. Y.

GENTLEMEN:

For convenience am enclosing copies of letters addressed to me by your Kansas City Branch Office dated July 25th and August 10. I have just returned from a discussion with them.

I telephoned this office the last few days of June to send down one of their representatives to my office, please, competent to analyze and compare my four policies carrying one hundred thousand dollars insurance protection. I wanted to know all about the coverage and cost, credits in them now. Two of their office representatives have called on me as a result of this request at different times, not once but a few times each. I have given them the four policies and they have examined into them. Mr. Holland, who sold me the policies is dead.

After carrying on all these discussions, I requested they write me in confirmation. Hence their ' tter July 25th.

I was operated upon in April, 1933, for stomach ulcers and four months previously the New York Life examined me for insurance and said I was all right previously. I did not take the insurance as I had sufficient. Now I spend an entire month trying to find out just what my policies are good for and, wrong again.

I do not think the Kansas City office is entirely familiar with analyzing their own policies. I advised them at the outset of all these discussions what I was up against and why I needed their best brains to advise me.

Won't you have someone in your New York office analyze my four policies for coverage, cost I have paid in past and for future if kept in force and, credits now in them. I discussed with a young lady in the office here several months ago about changing all these policies to some other basis more favorable to me in view of the loans against them now, but she advised very positively not to do so.

I am totally and physically disabled. I have plenty of work but can't work. My source of revenue has ceased and, if my insurance cancels I can't take out more in my present state. Find a way, please, to keep my insurance in force to January 2nd, 1935, and also have all my four policies analyzed closely as, I do not

think this matter has been thoroughly handled at this end.

Yours truly,

(Signed) S. R. Toucey.

Note: The New York Life letter to appellant signed M. M. McKinny, dated July 25th, 1934, originated my above letter to home office, started a live file with numerous interchanged letters on both sides which did not end until September, 1935, when I discovered the "fraud" committed on me June 29th, 1934. New York Life last letter to me dated September 6th, 1935, in this file. All my effort with view to have premiums paid by the New York Life until January 2nd, 1935, as New York Life so agreed, July 25th, 1934.

* * * * * * *

On June 29th, 1934, on my request the New York Life Kansas City Branch office's cashier (Shellhorn) and his assistant (Wells) advised me terms of policy No. 8 611 895 was "Life and Accident". New York Life letter to appellant dated January 9th, 1924, stated policy No. 8 611 895 term to be life and accident. This letter, a component part of policy No. 8 611 895 admitted to evidence with policy at trial. On page #4 of this petition, clause #3 quotes Federal court decision "*If there is nothing in application for policy that is inconsistent with the Terms of Policy, one is presumed to know provisions of policy, etc.*"

The signed medical examination application, November 13th, 1923, states policy to be issued in Ordinary Life; the New York Life letter to appellant dated January 9th, 1924, states policy terms to be "Life & Accident double indemnity"; policy No. 8 611 895 itself carries terms of Life, Health & Accident, double indemnity. See page 2 of this brief for policy No. 8 611 895. Appellant did know terms of policy No. 8 611 895 to be Life & Accident and so testified. One buys insurance on confidence, pays premiums on confidence and in confidence requests his insurance for

advice on his insurance policies, and this is what I did do June 29th, 1934.

Federal court decision in error: It ignored facts contained in policy No. 8 611 895 and component parts, also testimony thereon.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Eighth Circuit commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for Eighth Circuit in the case entitled *Samuel R. Toucey, Appellant, v. New York Life Insurance Company, a Corporation, Appellee,* docket No. 11228, in Equity, to the end that this cause may be reviewed and determined by this Court; that the judgment herein of the United States Circuit Court of Appeals Eighth Circuit be reversed by this court; and that the petitioner be granted such other and further relief in the premises as to the Court may seem appropriate and proper.

SAMUEL R. TOUCEY,
Petitioner.

#131 West 61st, Street Terrace,
Kansas City, Missouri.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions in the Court Below.

The opinion of the District Court appears in full in the record.

The opinion of the Circuit Court of Appeals appears in full in the record.

II.

Statement of Basis on Which the Jurisdiction of This Court is Invoked.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938 (28 U. S. C. A. 347a), and under same Act, Chapter 229, Section 8, 43 Stat. 940 (28 U. S. C. A. 350).

III.

Statement of the Case.

Petitioner has stated the case in the "Summary Statement of the matter involved" in foregoing petition for writ of certiorari which is hereby adopted and made a part of this brief.

IV.

Specification of Errors Intended to be Urged.

1). The Circuit Court of Appeals erred in affirming the judgment of the District Court in favor of respondent.

2). The Circuit Court of Appeals erred in not holding that by reason of the prohibition contained in Section 379, U. S. C. A., Title 28, Section 365, Judicial Code, a Federal

court may not stay proceedings *in personam* pending in a State court.

3). The Circuit Court of Appeals erred in *not holding* that after a *Court In Equity* has decided the equitable issues adversely to the petitioner, *such Court has lost jurisdiction to try and determine legal issues.*

ARGUMENT.

Summary of Argument.

POINT A.

BY THE PROVISIONS OF SECTION 379, U. S. C. A., TITLE 28, SECTION 265, JUDICIAL CODE, A FEDERAL COURT MAY NOT STAY PROCEEDINGS IN A STATE COURT WHERE THOSE PROCEEDINGS ARE *In Personam.*

POINT B.

THE COURT, HAVING DETERMINED THE EQUITABLE ISSUES IN THE ORIGINAL EQUITY PROCEEDINGS ADVERSELY TO PETITIONER, *Lost Jurisdiction* TO DETERMINE THE LEGAL ISSUE OF *Disability.*

Point A.

By the Provisions of Section 379, U. S. C. A., Title 28, Section 265, Judicial Code, A Federal Court may not stay proceedings in a State Court where those proceedings are in personam.

It is clear that the original action in equity to avoid the reduction in amount of the policy and to procure a reinstatement of that policy was an action *In Personam.*

It is clear that the action at law in the State court brought by petitioner's assignee upon the policy to recover disability benefits was also an action *In Personam.*

Petitioner concedes that, by judicial interpretation, it is well established that in spite of the provisions of section

379, U. S. C. A., Title 28, a Federal court which first acquires jurisdiction of a *res* may enjoin subsequent proceedings in a State court involving the *same res*.

That rule, however, is limited to actions which involve *res*. Where an action, *As Here, Is In Personam*, in which nothing more than a personal judgment is sought, there is and can be no objection to a subsequent action either before or after judgment, and this because the subsequent action neither "ousts" the jurisdiction of the court in which the action was first brought nor does it delay or obstruct the exercise of that jurisdiction nor lead to a conflict of authority where each court acts in accordance to law and where the actions, *As Here*, are *In Personam*.

A judgment rendered in one court, or in one of the courts, may be pleaded in another and the effect of the judgment is to be determined by the application of the principles of *res adjudicata* by the court in which the action is still pending, in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law.

In *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 67 L. Ed. 226, 24 A. L. R. 1077, this Court said:

> "It is settled that where a federal court has first acquired jurisdiction of the subject matter of a cause, it may enjoin the parties from proceeding in a *state court* of concurrent jurisdiction whe e the effect of the action would be to defeat or impair the jurisdiction of the federal court: Where the action is in *rem*, the effect is to draw to the federal court the possession or control, actual or potential, of the *res*, and the exercise by the *state court* of jurisdiction over the same *res* necessarily impairs, and may defeat, the jurisdiction of the federal court, already attached"
>
> • • • • • • •
>
> "But a controversy is not a thing, and a controversy over a mere question of personal liability does *not* involve the *possession* or *control* of a *thing*, and an action

brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each Court is free to proceed in its own way and in its own time, without reference to the proceedings in the other Court. Whenever a judgment is rendered in one of the Courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of *res judicata* by the Court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case. The rule, therefore, has become generally established that where the action first brought is *In Personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded".

The Foregoing Decision Has Been Repeatedly followed by the Circuit Court of Appeals for the Eighth Circuit.

For this reason appellant quoted on page #63 of this petition for writ of certiorari the *Memorandum of Opinion on Motion to Dissolve Temporary Injunction by District Court* and calls the Honorable Supreme Court of the United States attention to fact Federal court failed to point to a single precedent case to cite in the place of the above quoted decision:

In Armour & Company v. *Miller*, 91 F. (2d) 521, the Eighth Circuit Court of Appeals said (l. c. 525):

> The Baldwin Case, supra, makes it fairly clear that if this were a bankruptcy matter, or even a case wherein a *res* was in *custodia legis* and jurisdiction over it had, as to the federal court, been, as against the state court, antecedently acquired, injunction would lie against the plaintiffs in the state court cases to enjoin further prosecution of their several actions. But here there is no *custodia legis;* the latter court merely has jurisdiction of a controversy, namely, an action for an injunc-

tion. Such an action argues no lien, and comprehends no *res* which may be affected by action in a state court. An injunction suit is an action *In Personam* and operates against persons and not property. 14 R. C. L. 307. The several actions now pending in the state court are being prosecuted by the 16 persons herein sought to be retained in the Court of respondent are actions also *In Personam*, namely, suits at law for damages to be paid in money. The great weight of authority warrants the view that it is the duty of a federal district court to retain jurisdiction of and to decide a case pending before it, notwithstanding the pendency of an action *In Personam* in a state court which involves the same subject matter: Boynton *v.* Moffat Tunnel Imp. Dist., (C. C. A.) 57 F. (2d) 772, 778; Krauss Bros. Lumber Co. *v.* Louis Bosert & Sons, (C. C. A.) 62 F. (2d) 1004, 1006; *Jensen* v. *New York Life Ins. Company*, (C. C. A.) 59 F. (2d) 957; Rogers *v.* Paving, Dist., (C. C. A.) 59 F. (2d) 555, 558; McClellan *v.* Carland; *Kline v. Burke Construction Company*, 260 U. S. 226, 43 S. Ct. 79, 82, 67 L. Ed. 226, 24 A. L. R. 1077.

"In such a situation the case of *Kline & Burke Construction Company*, supra, as we read it, holds that an action to enjoin further prosecution by the plaintiffs in the state court cases would not lie in favor of Armour & Company because there was no custody of property in the federal court to be protected by the injunctive process. See Stewart Land Company *v.* Arthur, (C. C. A.) 267 Fed. 184. In the case of *Kline & Burke Construction Company*, supra, the Supreme Court quoted with seeming approval what was said in Baltimore & Ohio R. Company *v.* Wabash R. Co., (C. C. A.) 119 Fed. 678, 680, thus:

To the same effect are the following cases:

W. E. Stewart *v.* Arthur, 267 Fed. 184 (8th Circuit Court of Appeals);

Desha County *v.* Crocker, 72 F. (2d) 359 (8th Circuit Court of Appeals).

If the opinion of the Eighth Circuit Court of Apeals in above entitled cause is to stand Section 379, U. S. C. A. Title 28 does not mean what it says, there is no limitation upon the right of a Federal court to stay proceedings in a State court and that section of the statutes means nothing, has been repealed, and is a dead letter. Also the Constitution so far as a State citizen obtaining justice against his Goliath Insurance Corporation.

Point B.

The Court, having determined the equitable issues in the original equity proceedings adversely to petitioner, lost jurisdiction to determine the legal issues of disability.

* * * * * * *

The original petition in equity counted upon FRAUD (Committed June 29th, 1934) in the procurement of the reduction in amount of, and lapse of policy: A complete stranger to appellant was used by defendant in late July, 1934 (their Mr. M. M. McKinney—see letter July 25th, 1934, page #68) to obtain reduction in policy No. 8 611 895 and cash surrender values on three additional policies. Whether appellant might have had a judgment in that case did not depend upon *proof* by him of *total disability* for, upon proof of FRAUD in the procurement of the lapse of the policy, petitioner would have been entitled to a decree of reinstatement in the original amount (or reduced amount) conditioned upon payment of premiums, regardless of *disability*.

In Couch, Cyc. of Ins. Laws, Par. 1429, Vol. 6, it is said:

> "* * * So, it is held that for a wrongful cancellation for nonpayment of premium, the plaintiff was entitled to have the policy declared in force, but that it should also be adjudged that the premiums due, with proper interest, be paid".

To the same effect are Meyer *v.* Knickerbocker Life Ins. Company, 73 N. W. 516; *Whitebread v. New York*

Life Insurance Company, 102 N. W. 143; *New York Life Insurance Company, v. Eggleston et al.*, 96 U. S. 572, 24 L. Ed. 841; Mutual Reserve *v.* Ferrenbach, 144 Fed. 342 (8th C. C. A.).

An action in equity draws to it all issues, equitable and legal, essential to complete adjudication of the issues between parties. As a concomitant of the rule, it is clearly established that when a Court in Equity determines the equitable issues adversely to the petitioner, whether for lack of proper averment or lack of proof, that court loses jurisdiction to determine the legal issues.

Your petitioner believed in starting this ARGUMENT on page #77 of this petition for writ of certiorari, in coming to the conclusion, while contained in the record, the following opinion rendered by the Federal court when entering temporary injunction stopping State court jury trial (March, 1938) said:

It is in order to state in petition at outset "Fact No. 1" as mentioned in opinion to be quoted in decision rendered said:

> "Finding of fact No. 1: I find the fact to be that the defendant did not in any manner or by any means conceal from the plaintiff that the $50,000 contract or policy of insurance did contain a provision for indemnity against total and permanent disability; *On the Contrary*, the defendant advised the plaintiff that it contained such a provision."

The defendant denies in the record itself that it did advise appellant that policy contained such a provision. That defendant has always so denied is self-evident. Hence, the Federal court decision here was in error.

Fact No. 2 as mentioned in opinion, quote from Federal court decision:

> "Fact No. 2. He certainly is totally disabled, I would think, from carrying on the same kind of business en-

terprise as that upon which he was engaged and at which he was very successful. He cannot do that or anything of that character; but it is an incorrect interpretation of this contract to conclude that if he cannot do what he did do therefore, he is totally disabled within the meaning of this contract, etc."

* * * * * * *

MEMORANDUM ON APPLICATION FOR TEMPORARY INJUNCTION.

(Entered by Federal Court.)

"We shall not write an elaborate opinion on the application for a temporary injunction but only enough to make it clear to counsel that we have not ruled arbitrarily the questions involved.

1. The decision in the trial of this case (see finding of fact No. 2) that Samuel R. Toucey was not and never had been totally and permanently disabled is *res adjudicata* of the issue. It was in issue in the case, made so by the pleading. It was the plaintiff who submitted that issue and who asked that it be decided. He was not required to do that but he had the right to do that. We had the right to decide the issues the parties submitted and to bottom the decree upon the decisions of all issues of fact. We did that.

Had there been an appeal the Circuit Court of Appeals would have heard the case *de novo*. It might well have disagreed with our *finding of Fact No.* 1 and nevertheless affirmed the decree because of *finding of Fact No.* 2. Certainly the decision of an issue which might be the sole basis for affirmance of a decree is a decision arising to the dignity of *res adjudicata*.

2. If Samuel R. Toucey himself were to have brought the suit which James Shay has brought in the Circuit Court of Jackson County, the prosecution of which the supplemental bill here seeks to have enjoined, unquestionably injunction would be a proper remedy to prevent the prosecution of that case. Fiske *et al. v.* State, (8 C. C. A.) 62 F. (2d) 150. It would be a proper remedy also as against any assignee of Toucey suing

to recover on Toucey's cause of action. The language of the Court of Appeals in the case cited (l. c. 154) is especially pertinent. As there, so here, it is evident that the contemplated action in the state court is for the purpose of relitigating the very questions which were litigated in this court and in this case.

3. Of course, this Court cannot enjoin Shay *eo nomine* nor *his attorneys* from prosecuting Shay's suit in the state court, unless Shay is brought within the jurisdiction of this Court and he has not been. This court can only enjoin the prosecution by Toucey, his agents and attorneys, of the cause of action heretofore litigated in this court. It can enjoin the prosecution of that cause by Toucey either in his own name or by an assignee. A temporary injunction, so limited, should issue. A form of temporary injunction may be submitted for approval and entry."

• • • • • • •

With petition in suit in equity filed in State court, *October*, 1935, transferred from State to Federal court and trial *held November*, 1936, petitioner *delayed one year and one month* for *Federal court trial* through no fault of his own nor so contributing to such delay, *part No.* 1 of Federal court decision rendered on *disability* would have legally forced *defendant* to meet *policy obligation* in *New York Life policy No.* 8 611 895 under *disability clause*, had trial occurred where started in *Missouri State court:* It is significant Federal court decision injected *Part No.* 2 on *disability decision*, and the Federal court itself points to this part of *disability decision* in this rendered opinion above quoted to consider had the Federal court decision been appealed, if decision overruled on *Fact No.* 1 *of decision*, Eighth Circuit Court of Appeals would undoubtedly affirmed decision on *Fact No.* 2 *of decision on disability.*

Any such legal argument as thus advanced by the Federal trial court in this opinion quoted, and any such legal phi-

losophy as thus expressed in such decision cannot, nor did the Constitution ever so intend, be affirmed by the Supreme Court of the United States by Supreme Court silence by not taking jurisdiction in this above entitled cause on writ of certiorari thus put before the Supreme Court of the United States and by this petition.

Lower courts cannot be permitted to overrule Supreme Court of United States law itself, as this Federal court trial and decision did so overrule even though affirmed by the Eighth Circuit Court of Appeals Eighth Circuit, also in error. There never existed a legal right for Federal court to enter this temporary injunction stopping State court jury trial in an action *In Personam*. No other argument seems necessary for the Supreme Court of the United States to overrule lower courts.

The leading case is the decision of the Supreme Court of the United States in *Dowell* v. *Mitchell*, 105 U. S. 430, 26 L. Ed. 1142.

Here complainant sought to foreclose a mortgage executed by a surviving partner to secure three notes on the partnership obligation. It appeared that the mortgage was upon the separate property of the deceased partner. Accordingly, the trial court held that the right to foreclosure was not established. Nevertheless, although denying the equitable relief, the trial court decreed a judgment against the surviving partner and the administrator of the deceased partner for the amount due on the notes.

On appeal, the Supreme Court held that the equity jurisdiction of the court failed; that accordingly it had no jurisdiction to render the judgment on the notes. It was said:

> "Without going into a discussion of the evidence on the subject, we declare our opinion to be that the circuit court was right in holding that the title to the property described in the mortgage executed by Brazell in

the name of the firm of Barron & Brazell had never been either in the late firm or in Brazell, but was in Barron, the deceased member of the firm at the time of his death, and that the date of the mortgage the title of the mortgage premises was in the heirs of Barron.

"When this fact was established by the evidence and found by the court below, its jurisdiction, sitting as a court of equity to proceed any further in the cause, was lost, and it was without authority to render a decree upon the notes which the invalid mortgage was intended to secure.

"When the court found there was no mortgage, there was nothing left for it to act upon but the promissory notes, and on that cause of action there was a *plain, adequate and complete remedy at law,* and it should have dismissed the bill without prejudice to an action at law.

"The rule is, that where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill and remit the cause to a court of law. Russell *v.* Clark, Cranch 69; Price's Pat. Candle Co. *v.* Bawwen's Pat. Candle Co., 4 Kay & J. 727; Baily *v.* Taylor, 1 Russ. & M. 75; French & Howard, 3 Bibb, 303; Robinson *v.* Gilbreth, 4 Bibb, 184; Nourse *v.* Gregory, 3 Litt. (Ky.) 378".

THE FOREGOING CASE HAS BEEN APPROVED AND FOLLOWED IN MANY SUBSEQUENT DECISIONS, including the following:

American Falls Milling Company v. *Standard Brokerage & Distributing Co.,* 248 Fed. 487 (8th C. C. A.);
Linden Investment Co. v. *Honstain Brothers Co.,* 221 Fed. 178 (8th C. C. A.).

* * * * * * *

When the trial court found there was no "FRAUD" nor "CONCEALMENT", there was nothing left for it to act upon except the claim for "DISABILITY BENEFITS" under New York

Life Policy No. 8 611 895 "DISABILITY CLAUSE", and on that cause of action there was a *Plain, Adequate* and *Complete Remedy at Law,* and the *Dismissal* of the *Bill in Equity* was, *in Law,* without *Prejudice* to a subsequent action *in Law.*

The trial court RECOGNIZED but failed to give effect to the *Rule* when he said:

> "What I have thus far said fully determines the case. I think, however, that I should make one further finding of fact concerning the issue of fact that is involved in the case, although perhaps its decision, in view of what I have already said, is not absolutely necessary".

Conclusion.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a Writ of Certiorari and thereafter reviewing and reversing the said decision.

SAMUEL R. TOUCEY,
Petitioner.

Address:
No. 131 West 61st Street Terrace,
Kansas City, Missouri.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 3 1941
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 587

SAMUEL R. TOUCEY,

Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY,
A CORPORATION.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

SAMUEL R. TOUCEY,
Pro Se.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 587

SAMUEL R. TOUCEY,

Petitioner,

vs.

NEW YORK LIFE INSURANCE CO.,

Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THERETO.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Supreme Court docketed above writ of certiorari November 20th, 1940, appellant obtained service on respondent with copy November 30th, 1940, and on December 7th, 1940, respondent obtained service on appellant with copy of "BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI".

Your petitioner, Samuel R. Toucey, respectfully prays to the Honorable Supreme Court for permission to answer respondent as follows:

Respondent on page 2, clause 2 of this brief charges to this Court "The application does not conform to Rule

#38 of the Revised Rules of this Court adopted February 13th, 1938", and on page 5, clause 2 of same brief again repeats same charge and quotes excerpt of rule 38 and quotes excerpt of paragraph 5.

Petitioner quotes Rule #38, clause 2 as referred to—quote

> "The petition shall contain only a summary of short statements of matter involved and reasons relied on for allowance of writ. A supporting brief may be included in petition, but whether so included or presented separately it must be direct, concise and in conformity with rules 26 and 27. A failure to comply with these requirements will be sufficient reason for denying petition".

Continued, Rule #38, clause 5—quote

> "A review of writ is not a matter of right, but good sound judicial discretion, and 'shall be granted only where there are special and important reasons therefor'," then illustrates examples A-B-C:

Petitioner believes his petition for writ of certiorari submitted (thus criticised) fully complied with the letter of Rule #38 in all respects, together with other Supreme Court laws also governing the compilation of writ of certiorari, appropriately indexing writ and classifying pages #17 to #53 of writ as intended by governing Supreme Court laws and including Rule #38.

With due regard for brevity, direct and concise statements, the colossal frauds perpetuated (and deliberately so) upon Petitioner by defendant in years 1923, 1924 and 1934 involving New York Life Insurance Policy No. 8 611 895 and its component parts (of which there are several) some admitted to evidence at federal court trial (1936) and to which petitioner testified, for federal court's final decree to destroy this policy and its component parts in the name

of the "law" does present the necessity (Rule 38, paragraph 5) for petitioner to put before this Honorable Court "where there are special and important reasons therefor":

Respondent's criticism is, therefore, in error and not rendered advisedly.

Respondent's brief (page 5, paragraph 2) states—quote

> "The first 29 pages of the petition are a series of incoherencies and do not relate to anything in the record on appeal or to any possible ground for certiorari".

Petitioner states that on page #17 of petition for writ of certiorari reference is made to Supreme Court order entered by Mr. Justice Douglas; and on page #55 reference is made to order entered by Mr. Justice Reed of Supreme Court; and on page #1 of writ New York Life policy No. 8 611 895 and some of its component parts appear, page #3 excerpt of decision rendered by federal court thereon, etc.

If these few facts are true, as they are, scant consideration should be given to the charge "the first 29 pages of writ are a series of incoherencies and do not relate to anything, etc.".

Respondent admits, however, petitioner's writ of certiorari commences with page #58.

Petitioner frankly states to this Honorable Court if all of the pages of his writ of certiorari (87) were to be destroyed and page #58 preserved it is the only argument necessary for the Supreme Court of the United States to accept the petition for writ of certiorari and take jurisdiction.

The federal court, when entering injunctions stopping a Missouri State Court jury trial "overruled" the Supreme Court of the United States law with petition for suit in equity (fraud—1934) before federal court only for trial to determine as the action was clearly *in personam*.

Petitioner refers the court to page #62 of writ:

> If the issue in this suit in equity had involved the issue of policy reinstatement due to cancellation on the charge of fraud, back premiums to be paid by policy holder with interest, surely a federal court would not consume over three days to try policy holder to determine if he was disabled under policy disability clause.
>
> The federal court had no more legal right to do so with petitioner in above entitled cause in suit in equity with the one issue to reinstate policy due to fraud.

The Circuit Court of Appeals, Eighth Circuit, likewise "overruled" Supreme Court law in not correcting federal court on appeal.

Rule #38, clause "B" clearly calls for the exercise of Supreme Court of the United States power of supervision on this petition for writ of certiorari.

A colossal deceit was practiced on both these lower courts (sitting as a three judge federal court) by some 137 different insurance companies at about the same time respondent deceived federal court also on above entitled cause.

Not a clear, concise and applicable precedent case has been put forward by respondent to justify federal court injunctions entered, much less court's final decree which, if executed in the name of the law, destroys New York Life policy No. 8 611 895 containing abundant written proof why and how this respondent deceived petitioner in deliberate perpetrated efforts over a long period; and the federal court decision was in error on the document itself (with two component parts thereof) before the court as evidence, petitioner testifying to such fraud.

On the contrary, petitioner's precedent cases (of which there are several) clearly show federal court had no legal right to enter its injunctions, nor the Circuit Court of Appeals to concur therein.

Respondent's opposition to writ here is apparently based on the charge "The first 29 pages of petition by petitioner are a series of incoherencies and do not relate to anything, etc.", together with the injected word "scandalous" and all it implies, lacking any mention of proof to substantiate.

Petitioner's answer to that is, an Honored Supreme Court Justice of the Supreme Court of the United States who rendered a court decision while serving in the State of New York and not in favor of this respondent's corporation, but this Honored Jurist was, I consider, "SCANDALIZED" and nationally so and by what was considered privileged groups before the year 1916. A Goliath Corporation such as my corporation with three billions of dollars (some sixty thousand dollars of it my hard earned money) should not resort to injecting the word "SCANDALOUS" in its brief discussed here and not be prepared to prove it. Your petitioner's conviction is he was selected as a victim to restore into the state of Missouri the exploitation of its citizens and in the name of the law further prevented by Missouri state courts with the adoption of Missouri state established law on disability.

Page #58 and page #83 of writ are not charged to be wrongfully phrased by respondent. On page #83 appears written opinion by federal court when entering injunction stopping state court jury trial. By such written opinion the Honorable Federal Court itself (second paragraph clause one) states that if its decision (rendered November 23, 1936) had been appealed that the higher court "*might well have disagreed with our Finding of Fact Number* 1 *and nevertheless affirmed the decree of Finding of Fact Number* 2". Fact No. 1 in petition of suit in equity was fraud, year 1934.

Finding of Fact number two was that part of Federal court's decision in disagreement with Missouri State estab-

lished law on insurance policy disability clause (the gold mine for dishonest insurance) and the Federal court never had a legal right to adjudicate that issue in the petition for suit in equity transferred from State to Federal court for trial. Here is a written admission by the Federal court itself petitioner could not have effectively appealed decision rendered November 23, 1936, and because the Federal court had disagreed by decision with Missouri State established law on disability: Then the same Federal court enters injunction (March, 1938) stopping State court jury trial of same case, and on August 14th, 1939, enters permanent injunction with court's final decree. Destroy policy in the name of the law. Such cannot be claimed to be a "fair" trial even if Supreme Court law permitted Federal court injunctions, but Supreme Court law clearly does not so permit and to so permit the Supreme Court would be compelled to change its own law first with this writ of certiorari before Supreme Court or some other similar action. The Federal court never had a legal right to rule on the issue of disability in petition of suit in equity before it carried there from State court.

The closing word in Respondent's "Brief In Opposition to Petition for Writ of Certiorari" is "SCANDALOUS".

Petitioner prays the Supreme Court appreciates writ of certiorari only states the facts for which there is ample and full corroboration by the written record and this the Honorable Court must have. Petitioner, however, thus invited by Respondent will give his interpretation of the word "SCANDALOUS".

In the year 1916 the much Honored Jurist by lovers of our Democracy was appointed by the President to the Supreme Court of the United States, Mr. Justice Brandeis. While Justice Brandeis was on the bench in the State of New York he conducted trials and rendered decisions, and one in par-

ticular petitioner recalls not in favor of Respondent's Corporation.

It is a nationally accepted fact one or more groups "scandalized" this appointment by the President of the United States of Justice Brandeis.

However, Justice Brandeis did remain on the Supreme Court of the United States when that august body and by majority rule rendered Supreme Court of United States decision—"No Federal court at any time had a right to disagree with state established law on disability", in the year 1938.

Petitioner in petition for writ of certiorari names and points to actual documents in his possession still, as well as documents in possession of a third party. There exists a document in possession of the Veterans Administration (and not mentioned in writ of certiorari or in any of petitioner's petitions including this petition) which definitely proves a most "scandalous" attempt by respondent to obtain Federal court testimony tending to support a Federal court decision in disagreement with state established law, but respondent's attempt failed miserably. Petitioner had full opportunity to outline all this in the fullest detail in petition for writ of certiorari but believed page #58 and page #83 of writ, clearly within the certified record and so accepted by Respondent, more than sufficient to hope for Supreme Court favorable action. It is clearly a "disdain" attempt by Respondent to clarify this brief In Opposition to writ of certiorari with the word "SCANDALOUS" without mentioning any supporting facts to justify any such inference, and I now challenge Respondent here or anywhere to undertake to do so.

Respondent's opening argument at federal court trial carried the charge petitioner came into court with "unclean hands"; and again respondent's opening charge to encour-

age the court's injection of injunctions was—petitioner had been discourteous to the court for his audacity to undertake to try his suit against respondent in his own State court and before a jury. Undoubtedly the injection of the word "SCANDALOUS" at the outset of Supreme Court litigation carries the hope for similar success to defeat justice.

Petitioner has stated facts, not scandal in petition for writ of certiorari and prays the Supreme Court will accept writ, take jurisdiction and overrule the lower courts so that the above entitled cause can obtain a "fair" trial and then let the decision, and before a jury, be as it may.

MAJOR S. R. TOUCEY,
Petitioner.
Address: *Kansas City, Mo.*
#131 West 61st Street Terrace.

(2150)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 587

SAMUEL R. TOUCEY,

Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR PETITIONER.

SAMUEL R. TOUCEY,
Pro se.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 587

SAMUEL R. TOUCEY, *Petitioner,*

vs.

NEW YORK LIFE INSURANCE COMPANY, *Respondent.*

BRIEF IN ARGUMENT BEFORE SUPREME COURT OF THE UNITED STATES.

To the Honorable the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Having hoped to appear before this Honorable Court in oral argument and so invited have been unable to so appear.

My opening comment is a necessary prelude to what can be properly termed a Federal judiciary legal imbroglio and the underlying conditions which caused it. Without fear facts will be stated, in fact already have been, and if I have been derelict in my duty as a citizen to State or Nation it is for this Honorable Court to decide. Likewise any and all individuals involved have a right to appear and defend their action.

The case is one readily adjustible since the dispute was a reality. It required the honest cooperation of the two interested parties. A small effort.

Your petitioner finally filed suit in equity in Missouri State Court charging defendant "fraud" in the analysis of policy Number 8 611 895 to determine its disability clause, year 1934 and from the actual policy itself, suit in equity filed October, 1935. It never was nor never has been a question of your petitioner knowing the correct interpretation of this policy's disability clause. It has always been a question of defendant advising your petitioner terms of policy.

Suit in equity was transferred from Missouri State to Federal court and went to trial November 18th, 1936, trial lasting four full days until after five o'clock P. M. November 23rd, 1936, when Federal court rendered its decision. To walk across the street, therefore, from Missouri State to Federal court this defendant consumed one year and one month.

The defendant opened his Federal court argument at start of trial that your petitioner entered Federal court with "unclean" hands.

No appeal was taken from Federal court decision rendered November 23rd, 1936.

Suit was refiled by your petitioner in Missouri State Court, December 28th, 1937, docketed and finally set for trial.

In March, 1938, when the State court was to try suit Federal court of 1936 enters temporary injunction stopping State court trial.

Fortunately for petitioner Federal court wrote an opinion justifying Federal court injected injunction.

Appeal was taken on Federal court temporary injunction, March, 1938.

On February 24th, 1939, Circuit Court of Appeals Eighth Circuit rendered decision concurring in Federal court temporary injunction.

Petition for writ of certiorari was made to the Supreme Court of the United States. Supreme Court rejected writ.

On August 14th, 1939, Federal court entered permanent injunction and also court's final decree under which Marshal was to obtain from petitioner New York Life policy No. 8 611 895 with component parts, physically if necessary, and destroy policy.

Appeal immediately taken, granted by Circuit Court of Appeals Eighth Circuit.

On June 29th, 1940, Circuit Court of Appeals Eighth Circuit declined to write an opinion simply saying the first opinion (rendered February 24th, 1939) was "all right".

Petition for rehearing made, granted, but on July 22nd, 1940, Eighth Circuit Court of Appeals entered order denying rehearing, mandate to issue to Federal court August 2nd, 1940.

On July 24th, 1940, by letter, petitioner's attorneys withdrew from case. (See page #8 printed copy writ of certiorari.)

Your petitioner here charges this defendant stands here today before this Honorable Court with "unclean" hands. Defendant has had since morning of November 18th, 1936, to prove that charge against your petitioner. Your petitioner was ready to prove his charge against defendant within ten days following close of Federal court trial, November 23rd, 1936.

Federal court denied motion for rehearing, supported by affidavit witness would testify subpoenaed to testify at trial, setting out why witness did not testify at trial and also that defendant interferred with Federal court subpoenaed witness during session of trial, that knowledge of witness was on the suit in equity "fraud" by defendant, year 1934.

Petitioner calls this Honorable Court's attention to the fact when the Supreme Court rejected petition for writ of

certiorari on temporary injunction on first appeal, Brief of respondent in opposition to writ of certiorari prominently stated at opening that petitioner on December 28th, 1937, refiled suit of 1935 back in State of Missouri Court claiming that one, James Shay, was assignee of New York Life policy No. 8 611 895, and that your petitioner waited almost two years after November 23rd, 1936, to again appear before the Federal judiciary or any court.

This Honorable Court is aware that it permitted your petitioner to file petition for writ of certiorari in argument here today and that such petition for writ of certiorari was filed by petitioner November 9th, 1940.

On November 9th, 1940, your petitioner obtained service on defendant and filed copy of petition for writ of certiorari with defendant also on same date and submitted service thus obtained on defendant to Supreme Court.

That in petitioner's amendment to writ of certiorari thus filed November 9th, 1940 (pages 17 to 53 printed copy of writ), on page #28, last paragraph appears indisputable evidence existing proving on November 23rd, 1936, date Federal court rendered decision the New York Life directorate received from petitioner a much more serious charge than "unclean" hands against two officers of defendant in character of their Federal court testimony, pointing out to this same directorate if said two officers, together with still a third defendant officer who also testified at trial but disinterested and not a party to the charge made were put together, petitioner sent for this disinterested officer alone could prove the charge made by petitioner against its two officers. This refutes the defendant statement petitioner was silent until December 28th, 1937, almost two long years.

This evidence pointed to on page #28 printed copy of writ for certiorari is definite proof what your petitioner

was doing from November 23rd, 1936, to December 28th, 1937. Of course, this defendant knew it.

On September 3rd, 1937, in same evidence is to be found a personally signed letter to petitioner by a New York Life director inviting petitioner to take the charge to the courts.

To prove such a serious charge so readily provable from and by defendant official is quite another matter. If I did not, however, take it to the courts as invited by this director, I have taken it to the Federal government and intend to prove it there also.

As soon as I could engage attorneys, on December 28th, 1937, I re-filed suit in Missouri State Court as thus invited.

This defendant had no intention of going to trial in any court notwithstanding its director's request on me dated September 3rd, 1937.

March, 1938, on the very last day perhaps before going to trial in State of Missouri Court, jury all but climbing into jury box, was met by Federal court of 1936, who, by the power of Federal court temporary injunction stopped State court jury trial. This defendant there had a petition perhaps fifty pages long to influence the Federal court of 1936 to do plainly what the Constitution did not intend and never did so intend.

Your petitioner states here not a single one controlling precedent case was cited in this defendant's fifty page petition, nor has been cited by this defendant in any and all petitions, briefs, etc., it has prepared since in this long litigation which clearly justified the Federal court to enter any such Federal court temporary injunction.

The finality is to be enacted here today by this Honorable Court.

Before I get into the argument on the transcript of record of trial, my life time record as a citizen of Missouri and the nation had to stand bare when I undertook to obtain justice through the courts. I had grown to know this defendant.

When your petitioner filed suit in equity in State of Missouri Court, October, 1935, it mattered little to petitioner if a Missouri court or Federal court tried the case. Petitioner had the fullest confidence in both. This this Honorable Court appreciates.

Buying my first insurance policy in 1905 to protect my family, not myself, I developed into a potential buyer of insurance. For personal protection alone from 1905 perhaps I was medically examined and bought insurance policies in 20 different insurance companies.

This defendant is the only one of this volume of insurance companies with whom I ever had a dispute and with whom I ever filed a claim under its policy.

This defendant also has a life time record. It is not an enviable one. If this defendant spent as much time and money purifying it as it does to make it worse its policy holders might, in the end, have some hope. From my experience they have none now. It is all very well for a colossal insurance Goliath Corporation to advertise to the public what they pay back to policy holders. With its size it must. My purpose will always be from now on to force them to advertise by law what they collect and do not pay back to policy holders and what they spend to prevent having to do so by law. Also why they advertise their directorate to protect policy holders. Invite policy holders to write them freely for protection, etc.

Let your petitioner here assure your Honorable Court no publicity has occurred from his source on the issues in this litigation to date, no criticism directed against any court or any court decision so far rendered.

It would be impossible for petitioner to know wherein the fault lies under which Federal court would try this suit in equity, rule no defendant "fraud" year 1934, and from Federal court's own written opinion in entering injunction to stop State court jury trial (March, 1938) admit "Higher

court might well overrule its decision on 'FRAUD', but nevertheless at the same time affirm decision on DISABILITY."

Federal court rendered decision said—quote

> "I find the fact to be that the defendant did not in any manner or by any means conceal from the plaintiff that the $50,000.00 contract or policy of insurance did contain a provision for indemnity against total and permanent disability; *On the Contrary,* the defendant advised the plaintiff that it contained such a provision" End quote.

Appellant entered a serious charge to Justice Department against two officers of the New York Life for character of their testimony at Federal court trial as set out page #28 of printed writ of certiorari, last paragraph, who denied they took possession of policy No. 8 611 895 June 29th, 1934, to analyze from actual policy and advise petitioner if policy did contain provision for indemnity against total and permanent disability.

The Federal court is definitely in error here in its rendered decision.

Nor has your petitioner attempted to fathom why the Eighth Circuit Court of Appeals likewise is in error on decision it rendered February 24th, 1939, concurring with Federal court injunctions and court's final decree.

If the Federal court was in error in decision rendered "ON THE CONTRARY, the defendant advised the plaintiff that policy contained such a provision" the Federal court was again definitely in error in decision in saying "Was presumed to know terms of his policy".

Your petitioner has purchased many government bonds through the banks. By writing the bank advising what bond is desired, the bank replying giving terms of bond petitioner then bought and paid for, where does "law" come in if the bond is a counterfeit or spurious bond?

What's the difference on the terms of an insurance policy?

As I understand the Constitutional amendment permitting a corporation to first become an "individual" and as such transfer a State citizen who filed suit in his own State court from State to Federal court, such transfer was never intended under the Constitution for a Goliath Insurance Corporation to exploit the State citizen by obtaining a Federal court decision he was not entitled to under the Constitution.

As I understand it 137 different insurance companies transferred thousands of Missouri insurance policy holders from Missouri State to Federal court and a three judge Federal court rendered decision giving to the 137 different insurance companies ten to 12 millions of dollars belonging to Missouri Insurance policy holders. The three judge Federal court was deceived, of course.

But one of the three judge Federal court was my 1936 Federal court and one of the three judge Federal court was a member of the Circuit Court of Appeals Eighth Circuit. At same time I was one of the 137 different insurance companies' policy holder.

At the same time this defendant deceived the same two Federal courts on your petitioner's policy No. 8 611 895 and three additional policies.

Your petitioner has no confidence in this Goliath Insurance Corporation's honesty and believes when he concludes here your Honorable Court won't either.

Your petitioner's printed petition for writ of certiorari necessarily admits discussion of this case with Federal government branches, but beyond this petitioner has not discussed the case, the exception, of course, being his attorneys. None have any knowledge of my action since July 24th, 1940.

Memorandum on application for temporary injunction, opinion entered by federal court: Quoted in excerpt. In full appearing page #83 printed copy petition for writ of certiorari:

"Had there been an appeal the Circuit Court of Appeals would have heard the case de novo".

"It might well have disagreed with our finding of *Fact No. 1* and nevertheless affirmed the decree because of finding of *Fact No. 2*".

"Certainly the decision of an issue which might be the sole basis for affirmance of a decree is a decision arising to the dignity of res adjudicata".

Fact No. 1 was defendant "fraud" charged in petition of suit in equity, year 1934. Federal Court decision, no "fraud".

Fact No. 2 was federal court decision on disability under disability clause in policy No. 8 611 895.

By the Provisions of Section 379, U. S. C. A., Title 28, Section 265, Judicial Code, a Federal Court May Not Stay Proceedings in a State Court where Those Proceedings are In Personam.

It is clear that the original action in equity to avoid the reduction in amount of the policy and to procure a reinstatement of that policy was an action *In Personam.*

It is clear that the action at law in the State Court brought by petitioner's assignee upon the policy to recover disability benefits was also an action *In Personam.*

Petitioner concedes that, by judicial interpretation, it is well established that in spite of the provisions of Section 379, U. S. C. A. Title 28, a federal court which first requires jurisdiction of a "res" may enjoin subsequent proceedings in a state court involving the same "res". That rule, however, is limited to actions which involve "res". Where an action, as here, is *In Personam*, in which nothing more than a personal judgment is sought, there is and can be no objection to a subsequent action either before or after judgment, and this

because the subsequent action neither "ousts" the jurisdiction of the court in which the action was first brought nor does it delay or obstruct the exercise of that jurisdiction nor lead to a conflict of authority where each court acts in accordance to law and where the actions, As HERE, are *In Personam.*

A judgment rendered in one court, or one of the courts, may be pleaded in another and the effect of the judgment is to be determined by the application of the principles of "res" adjudicata by the court in which the action is still pending, in the ordinary exercise of its jurisdiction, as it would determine any other question of fact or law.

The court, having determined the equitable issues in the original equity proceedings (Fact No. 1) adversely to your petitioner, LOST JURISDICTION TO DETERMINE THE LEGAL ISSUES OF DISABILITY (Fact No. 2).

The original petition in equity counted upon "FRAUD" (Committed June 29th, 1934) in the procurement of the reduction in amount of, and lapse of policy.

Cashier Shellhorn and his assistant, Mr. Wells carried on negotiations with petitioner, Mr. Wells being an occasional caller at petitioner's office, making his last office call on petitioner June 29th, 1934, taking possession of New York Life policies.

A complete stranger to appellant was used by defendant in late July, 1934 (their Mr. M. M. McKinney, see letter July 25th, 1934, page #68), to obtain reduction in policy No. 8 611 895 and cash surrender values on three additional policies.

Whether your petitioner might have had a Judgment in that case did not depend upon *Proof* by him of *Total Disability* for, upon *Proof* of *"Fraud"* in the procurement of the lapse of the policy, petitioner would have been entitled to a decree of reinstatement in the original amount (or reduced amount) conditioned upon payment of premiums, regardless of *Disability.*

The Federal court opinion, therefore, entered to justify Federal court temporary injunction stopping Missouri State Court trial (March, 1938) quoted on page #5 was before the Circuit Court of Appeals, Eighth Circuit, on appeal of temporary injunction.

Glaringly this Federal court opinion points to Two Facts.

> Fact One. The Federal court apparently believed had decision been appealed the higher court would overrule—that "Fraud" was committed by defendant as charged in petition for suit in equity, defendant "Fraud" year 1934.
>
> Fact No. 2. Disability under disability clause in defendant policy No. 8 611 895: The federal court apparently believed had decision been appealed (joint decision on "Fraud" and "Disability", that higher court would have affirmed its decision due to findings on *Disability*.

Defendant "Fraud" was, therefore, not important to the Federal court. No wonder your petitioner was denied the right by Federal court to convince the court on "Fraud".

The Federal court never had a legal right to pass on the issue of *Disability* under policy No. 8 611 895; nor a legal right to enter temporary injunction and subsequent injunction and court's final decree.

On February 24th, 1939, Circuit Court of Appeals, Eighth Circuit, rendered decision concurring with Federal court's decision. Your petitioner desires to quote below excerpts from this decision: Quote:

> "But he alleged "That he did not know his rights under his policy and the coverage thereof" and in July, 1934, before he had reached the age of sixty years and while the premiums on the policy were fully paid up, he called upon the company "to advise him as to the coverage of the policy". That the insurance company, although it well knew of his then existing total disability and his rights to the monthly payments and

waiver of further premiums, fraudulently and intentionally failed to advise him of his rights under the policy and fraudently induced him to thereafter make a premium payment upon the reduced policy. He alleged that in September, 1935, he was advised by a medical examiner that his policy covered disability benefits for disease and he promptly made demands upon the company for reinstatement of his original policy and for payment of benefits in accordance therewith. He prayed the court to reinstate the original policy and to award recovery for disability benefits provided therein".

In deciding the case, the court said—still quoting

"I say that the plaintiff has made a most favorable impression on me. He is a man of capacity and integrity and of high standing, and I believe his testimony fully "as to the nature of his malady, but because I do believe him to be a man of great ability intellectually, and of much experience in the business world, I cannot believe and do not believe that within the meaning of this contract of insurance that we have here, the $50,000.00 policy, I do not believe that he is so disabled by his malady and disease as that he is prevented thereby from engaging in any occupation whatsoever for remuneration or profit. In the light of all of the other testimony in this case, of all the medical testimony, I think it is possible to come to the conclusion that this plaintiff is so TOTALLY AND PERMANENTLY DISABLED. I can understand his viewpoint. I can understand what I think is the viewpoint of his learned counsel. HE CERTAINLY IS TOTALLY DISABLED, I would think, from carrying on the same kind of a business enterprise as that upon which he was engaged and at which he was very successful. HE CANNOT DO THAT OR ANYTHING OF THAT CHARACTER, but it is an incorrect interpretation of this contract to conclude that if he CANNOT DO WHAT HE DID DO HERETOFORE, he is totally disabled within the meaning of this contract".

Still quoting from Federal court decision:

"The court also found that the insurance company had not in any manner or by any means concealed the fact that the policy contained the provision for indemnity against total and permanent disability from Mr. Toucey, but ON THE CONTRARY, the Company advised him that it contained such provision, and 'upon the facts and circumstances shown' Mr. Toucey was conclusively presumed to know the provisions of his policy. The court also found generally that Mr. Toucey was not entitled to the relief prayed for and dismissed the bill with prejudice at plaintiff's cost."

Continuing quoting Circuit Court of Appeals decision:

"But it was not alleged or claimed in Mr. Toucey's equity bill in the federal court that Mr. Toucey then held any policy which disclosed on its face an obligation of the insurance company to pay him his disability benefits of $500.00 per month. On the contrary, the verified bill of Mr. Toucey presented that the policy on which he was relying and which had previously existed, had been first altered and reduced and then had been cancelled for lapse, so that he could not have any recovery upon it at law. His petition to the equity court was to reinstate the whole original policy with all of its life insurance and other benefits. The grounds without which he could not have stated a case for reformation and reinstatement of his policy were the alleged total and permanent disability occurring in April, 1933, exempting him from premium payments after that date and the alleged fraud of the insurance company.

"Insofar as Mr. Toucey's prayer for recovery for his disability payments may be regarded as a dependent legal claim, it was a claim dependent upon Mr. Toucey's establishing his right to reinstatement of his entire policy. That right in turn was dependent upon proving the disability occasioning premium waiver and

also upon the alleged fraud of the insurance company in respect to said disability. Unless and until the equity court had before it evidence to justify it in finding both the disability and the fraud relating thereto, it could not award judgment on the disability provisions of the policy. But both of those claims were asserted and in controversy before it and the court in equity was called upon to decide upon both controversies. It did consider the evidence on both issues and we are cited to no implying case that a court of equity lacks power to fully and finally adjudicate all equitable controversies presented by the pleadings and the evidence in a case within its jurisdiction. Its adjudication on each claim in controversy was equally conclusive and binding upon Mr. Toucey.

"After that final adjudication had been made and decree entered, a law case for recovery of disability benefits has been ingeniously made out on the face of a petition in the state court by simply omitting the facts as they were established between the parties in the federal court equity suit. The pleader has omitted to show that Mr. Toucey made application to the insurance company for reduction of his policy and that pursuant to that application the alteration and reduction of the policy as to premiums and benefits was made and that he had recognized the change in the contract by making a payment of premium at the reduced premium rate. The hope of the plaintiff in the law case manifestly is to frame the pleadings so as to assert a claim of 'FRAUD' against the company in a subsequent pleading."

Your petitioner's object has been attained by quoting this much of the Circuit Court of Appeals, Eighth Circuit's opinion rendered February 24th, 1939, concurring with Federal court.

The action was *In Personam*. Petitioner had a legal right under the Constitution and laws thereunder to file suit at law in State of Missouri court, December 28th, 1937, and the Federal court had no legal right under the Consti-

tution and laws thereunder to enter temporary injunction stopping State court jury trial.

No controlling precedent case is cited by defendant, Federal court or Circuit Court of Appeals, Eighth Circuit, to justify their decisions.

Petitioner cites several controlling precedent cases to prove both lower courts had no such right as held out in decisions rendered.

Three defendant policies were cashed in for their cash values and policy No. 8 611 895 reduced in amount due to defendant "fraud" June 29th, 1934. An entirely strange official in defendant company and whom petitioner did not know when he entered his office late in July, 1934, to cash the policies in and reduce one in amount. This official did not have the policies, knew nothing about my disability, knew nothing about the defendant policy analysis on petitioner's request June 29th, 1934, to advise petitioner from actual policies policy terms.

This defendant official (Mr. M. M. McKinney, page #42, second paragraph, and page #68, last paragraph, printed copy writ of certiorari) so testified in Federal court trial. So did petitioner.

Yet the Circuit Court of Appeals decision states your petitioner undertook to frame insurance company on law suit, ingeniously make out of the face of the petition in equity a law suit, to quote "the hope of the plaintiff in the law case manifestly is to 'frame' the pleadings so as to assert a claim of fraud against the company in the subsequent pleadings".

The Federal court decision states on "FRAUD" "The higher court might well overrule decision on Fact No. 1; but nevertheless affirm decision on Fact No. 2".

The Circuit Court of Appeals decision states petitioner was trying to "frame" the insurance company and make a case of "fraud" against them.

Neither the Federal court decision or Circuit Court of Appeals decision mention or recognize why petitioner could not appeal Federal court's decision rendered November 23rd, 1936. This decision could not be appealed by petitioner due to the Federal court subpoenaing official hospital report, hospital ignoring served Federal court subpoena, hospital report not getting in record of Federal court trial so could be used on appeal. Hospital report was evidence on *disability clause* in policy No. 8 611 895. (See pages 43, 44 and 45, printed copy petition for writ of certiorari—amendment.)

The Circuit Court of Appeals Eighth Circuit necessarily would be guided by the Federal trial court; but even so the Federal court decision was not on appeal, but the Federal court temporary injunction, permanent injunction and court's final decree were on appeal to Circuit Court of Appeals and the action was clearly *in persona*. The Circuit Court of Appeals was in error in not correcting trial court.

The Supreme Court of the United States rendered decision January 29th, 1940, which your petitioner here quotes in excerpt. It is pertinent to the disability decision rendered in this above case: *Federal Court disagreed with Missouri State law.*

Carpenter v. *Wabash Ry. Company, et al.*, 309 U. S. 23, No. 230. (1, 2).

> "For the present purposes, we may assume, without deciding, that the determination of the court below was (27) correct upon the record before it and in the light of the law as it then stood. But it is our duty to consider the amended statute and to decide the question in harmony with its provisions, if found to be applicable. The controlling rule was thus stated by Chief Justice Marshall in United States *v.* Schooner Peggy, 1 Cranch, 103, 110, 2 L. Ed. 49: "It is the general truth that the province of appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if,

> subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. * * * In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside"

Early in year 1938, in the commonly known Erie case, the Supreme Court of the United States rendered decision—quote

> "No Federal court ever had a right at any time to disagree with State established law on disability, etc".

The Federal court decision rendered November 23rd., 1936, disagreed with *Missouri State established law on insurance policy disability clause*. This was defendant policy No. 8 611 895.

On February 24th, 1939, the Circuit Court of Appeals Eighth Circuit concurs in Federal court decision and disagreement with Missouri State established law on *disability*. By decision.

By the same decision the Circuit Court of Appeals Eighth Circuit contends the issue of disability, even though the law suit in State court was *in persona*, the Federal court had a right to enter temporary injunction stopping State court jury trial (March, 1938) because of the issue of disability. In fact because the Federal court, in rendering decision on "FRAUD" year 1934 as charged in petition in suit in equity first filed in Missouri State Court, October, 1935, also included in its rendered decision the issue of disability (which Federal court never had a legal right so to do) because Federal court did include the issue of disability in decision rendered November 23rd., 1936, Federal court had a "right" to enter temporary injunction stopping State court jury trial, March, 1938.

On petitioner's later appeal to Circuit Court of Appeals Eighth Circuit because Federal court entered permanent injunction and court's final decree (August 14th, 1939) the Circuit Court of Appeals Eighth Circuit declines to write an opinion, simply saying its first opinion (February 24th, 1939) was "ALL RIGHT" It was, of course, for defendant.

Your petitioner here quotes, in excerpt, decision rendered by the Supreme Court of the State of California simply to show a correct interpretation of the Constitution.

If American Democracy, of which we hear so much today as to whether it will survive, also the Constitution, is to survive, what the martyred Justice Cardozo once said will preserve both, if followed. (Page #51 writ of certiorari-amendment) Quote

> "It is the duty of a judge to objectify in law, not the Judge's own convictions, ambitions and philosophies, but the convictions, ambitions and philosophies of the spirit of his time."

The Supreme Court of California said—

Clockman vs. *Life Insurance Company.*

> "Where a policy holder has approached his insurer with a request for advice concerning his rights under the policy, if the agent of the insurer undertakes to advise, at least it should be the duty of such representative to make no false or misleading statement in that respect.
>
> "Ordinarily a policy holder who does not read his policy cannot complain if he loses out on some of the benefits which it offers. When the representative of the insurance company affirmatively misinforms him on the contents of the policy, he is excused for failing to read it and if he has surrendered it, relying on these false representations, the policy will be reinstated". End quote.

Petitioner made amendment to petition for writ of certiorari (Pages 17 to 53) filed November 9th, 1940, with the Supreme Court.

Circuit Court of Appeals Eighth Circuit entered order July 22nd., 1940, mandate would issue to Federal court August 2nd., 1940.

Federal court's final decree entered August 14th, 1939, thus would be enforced August 2nd, 1940. Marshal would take away from petitioner defendant policy No. 8 611 895 and component parts and destroy, "the law" August 2nd, 1940.

Defendant obtained petitioner's medical examination November 13th, 1923, by "fraud".

Defendant issued policy No. 8 611 895 against this November 13th, 1923, medical examination by "fraud".

Defendant's Home Office with policy No. 8 611 895 on its front page going into force and effect January 2nd, 1924, by pen and ink notation on back page of policy put policy into force and effect June 4th, 1924, and left front page as originally issued and to deceive petitioner. Policy No. 8 611 895, therefore, was put into force and effect June 4th, 1924, on a medical examination made November 13th, 1923, and even then this medical examination was obtained by "fraud". No re-examination made by defendant as to petitioner's physical condition, a period of more than eight months.

Petitioner intends to prove to this Honorable Court before conclusion this defendant did not care anything about all that back in 1923 and 1924. If it cared anything about it all as late as November, 1923, when testifying concerning policy No. 8 611 895 in Federal court the record is proof. Defendant must know when it issues a policy and why. If its Home Office changes both terms and date effective of original policy and why.

Policy No. 8 611 895 was, when writ of certiorari filed November 9th, 1940, with Supreme Court, needed for evi-

dence before two bodies other than Federal judiciary. (See page 24, last paragraph and page 28, last paragraph writ of certiorari-amendment).

The Federal court decision rendered November 23rd, 1936, found that petitioner did write, sign, stamp and mail two letters to defendant Home Office June 29th, 1934, and August 11th, 1934.

The Federal court said in decision while not passing on the issue of fact as to whether the plaintiff mailed the letters described in evidence, the court had no reason to doubt that the letters were mailed, etc. (See page 4, last paragraph, page #5 printed copy writ of certiorari-amendment.)

The Suit in Equity Charged "Fraud" Year 1934.

Transcript of record in case mentions defendant letters to petitioner dated July 25th, 1924, and August 10th, 1934. (See pages 68, 69 and 70 printed copy of writ of certiorari-amendment.) Defendant letters signed by their official, Mr. M. M. McKinney.

Transcript of record mentions petitioner's letter to defendant's Home office dated August 11th, 1934, enclosing copies of defendant's Kansas City Branch office letters signed M. M. McKinney dated July 25th, 1934, and August 10th, 1934. (See page #72 copy of writ of certiorari-amendment.)

Petitioner testified in Federal court trial defendant's official (M. M. McKinney) requested petitioner to write his August 11th, 1934, letter to Home Office direct.

Defendant's official, M. M. McKinney testified at Federal court trial and did not deny petitioner's testimony.

Petitioner wrote letter to defendant's Home Office also dated June 29th, 1934. (See page #67 copy of writ of certiorari-amendment.)

Petitioner testified in Federal court Veterans Administration requested petitioner to write defendant's Home office such letter on June 28th, 1934. (See page #25, last paragraph copy of writ of certiorari-amendment.)

Veterans Administration testified at Federal court trial and corroborated petitioner's testimony.

The Federal court, to decide the charge of "FRAUD" in petition in suit in equity, year 1934, was forced to pass on petitioner's two letters to defendant Home Office dated June 29th, 1934, and August 11th, 1934.

Yet Federal court decision states Federal court did not pass on this issue of these two letters, but court was convinced petitioner wrote, signed, stamped and mailed such letters.

Is it any wonder Federal court, by written opinion, when entering temporary injunction to stop Missouri State Court jury trial, March, 1938, said—

> "Had decision been appealed, higher court might well have over-ruled decision on "FRAUD" but nevertheless affirmed decision on disability."

Some court will necessarily have to decide, and by law, if your petitioner did write, sign, stamp and mail his letter dated June 29th, 1934, to defendant's Home Office, also his letter dated August 11th, 1934, to defendant's Home Office.

This won't be hard to do. The Veterans Administration's records prove petitioner did write such letter June 29th, 1934, and this defendant's Home Office took action on said letter.

There is still another action this defendant's Home Office took on petitioner's letter to them dated June 29th, 1934.

It withheld from the Veterans Administration the defendant's Home Office three day medical examination on petitioner made late in 1932 on petitioner's request. (See

pages 27 and 28 copy writ of certiorari-amendment.) Veterans Administration's records prove this also.

This defendant's three day 1932 medical examination disabled your petitioner. This is readily proven from petitioner's medical history. Why? There was no issue in 1932 medical examination as to whether policy No. 8 611 895 contained terms of a health provision. Petitioner has a right to believe had this defendant's Home Office in 1932, following its three day medical examination, advised petitioner his true physical condition, petitioner might have filed claim under policy No. 8 611 895 for disability benefits in 1932. Withholding from petitioner his true medical condition in 1932 defendant cause petitioner's emergency operation for stomach ulcers, April 1st, 1933, Chicago, only to use the ethical hotel surgeon who performed the operation as defendant's star medical witness at Federal court trial, November, 1936. (Again see pages 27 and 28 copy of writ of certiorari-amendment. Make correction therein here. Page #27 last paragraph, reads "nothing wrong yet 40 pounds in weight. Should read "forty pounds light in weight".)

As stated to this Honorable Court at outset here, page one, fifth paragraph, it never has been the issue in this legal imbroglio knowing the correct terms and interpretation of policy No. 8 611 895's disability clause.

What good would it have done petitioner to have known it if he did not?

The Federal court of 1936, and the Circuit Court of Appeals Eighth Circuit both render decisions (November 23rd, 1936 and February 24th, 1939) and the Federal court disagrees with Missouri State established law on insurance policy disability clause. The Circuit Court of Appeals Eighth Circuit rules, and takes a full year to do so, the Federal court's decision was "all right".

The conspicuous thing about the Circuit Court of Appeals decision, Eighth Circuit, is, your petitioner actually was "framing" a case on "FRAUD" against this defendant and the only reason petitioner could so "Frame" defendant was because the Federal court had passed on issue of disability in policy No. 8 611 895 where under well established constitutional law the Federal court never had any such right to determine the issue of disability.

The Federal court's duty here was to determine the charge of "FRAUD" in petition in suit in equity, "FRAUD" charged year 1934.

So far as petitioner being disabled was concerned, the New York Life medical examination for three days in 1932 disabled him. That was proven also in Federal court trial and can be readily proven today.

Here is a Federal court and its higher court, Circuit Court of Appeals Eighth Circuit both agreed on the interpretation of defendant's policy No. 8 611 895 disability clause.

Notwithstanding the numerous State court judges from all parts of Missouri held a convention, so to speak, back in 1926 and all agreed that, if an insurance policy holder came into court and proved that he was disabled, permanently and totally so, "FOR HIS REGULAR LINE OF WORK" that constituted insurance corporation's responsibility to be required by law to pay policy disability benefits. All dishonest insurance corporation so called "ambiguous" insurance policy clauses notwithstanding from 1926, Missouri State Established Law on disability, all Missouri judges agreed.

Let me ask this Honorable Court how a policy holder in Missouri could possibly interpret the disability policy clause in his policy if he sat up nights to try?

Here is your petitioner dragged from Missouri State Court in petition in suit in equity, "FRAUD" by defendant,

1934, and one year and one month consumed to walk across the street from State to Federal court, dragged there from Missouri State Court by this defendant for trial. Missouri judges agreed on the disability policy clauses not competent to try such suit.

Only for the same Federal court of 1936 to enter Federal court temporary injunction (March, 1938) stopping second attempt to try same suit in a Missouri State Court.

Ever since (March, 1938) the Federal judiciary has been on trial, not this defendant. Under the Federal judiciary rules and regulations I am not permitted to talk about what happened at Federal court trial of November, 1936, because I did not appeal Federal court decision.

The Federal court states itself in its own opinion why I did not appeal decision of November, 1936. "Fact No. One" and "Fact Number Two". See page five of this petition.

This Federal court fully appreciated back in 1936 the Supreme Court of the United States had not ruled on "*State Established Law on Disability*", in fact its written opinion clearly says so. It so lurks by inference.

Had I appealed Federal court November 23rd, 1936, decision, the Supreme Court of the United States necessarily would go into the entire case, testimony, evidence and all.

There was an official hospital report on me as a patient dated February 1st, 1936, and the Federal court issued its subpoena on this hospital, subpoena was served on this hospital morning of November 18th, 1936, when Federal trial opened demanding hospital to produce this official hospital report on me as a patient before Federal court trial as evidence.

This hospital ignored Federal court's issued and served subpoena on it. (See pages 43, 44 and 45, copy of writ of certiorari-amendment.)

The decision written by the Circuit Court of Appeals Eighth Circuit finding petitioner was trying to "frame" this defendant on the issue of "*Fraud*" and because the Federal court decision also ruled on issue of *Disability* was grossly in error.

This defendant was not only trying to "frame" the Federal court and did succeed in "framing" both the Federal court and the Circuit Court of Appeals Eighth Circuit.

Someone was trying to "frame" the United States Supreme Court by an appeal on Federal court's decision rendered November 23rd, 1936, knowing official hospital report on your petitioner, even though subpoenaed, did not get into record of trial so as could be used on appeal.

I have never charged that this defendant was a party to withholding this hospital report from Federal court evidence. I have so handled my investigation if this defendant was guilty of any part in this, this defendant would prove it to somebody else besides me in the final analysis.

I have charged and do charge here to this Honorable court this defendant did interfere with one of petitioner's Federal court subpoenaed witnesses and during session of trial. (See pages 15 and 16 copy of writ of certiorari-amendment.)

If the Federal court denied motion for rehearing and supported by affidavit this Federal court witness, if rehearing granted, would testify before Federal court as affidavit set-out, your petitioner could do nothing about it all in 1936.

This witness refused to make affidavit after Federal court denied motion for rehearing and properly so. He was himself an insurance executive in competition with this defendant.

But this witness did testify before the Federal grand jury *July 17th, 1940*, as to his knowledge and exactly as the signed affidavit before Federal court to support request for

rehearing set out. This witnesses knowledge was on "FRAUD" charged in petition in suit in equity, year 1934.

Witness believed that I was disabled as early as September, 1933, and at that time requested I give him defendant policies to analyze to see if policies contained a health provision. This I declined to do, advising if I ever wanted policies analyzed for health provision I would so request the defendant and so testified at Federal court trial, November, 1936.

Your petitioner assures this Honorable Court there is most positive proof and evidence existing year petitioner as early as 1932, positively so following operation April 1st, 1933, was "Permanently and totally disabled for his regular line of work".

If witnesses who testify before Federal grand jury July 17th, 1940, only with knowledge on "FRAUD" committed by this defendant on petitioner June 29th, 1934; but also believed your petitioner was disabled as stated, wanted to analyze defendant policy No. 8 611 895 to determine if policy contained a health provision, your petitioner declining to let them (September, 1933) definitely testified to on this fact, no one can, petitioner is sure, convince your Honorable Court petitioner at any time was attempting to "frame" this defendant on the issue of disability benefit payments under policy No. 8 611 895 as the Honorable Circuit Court of Appeals Eighth Circuit states by decision rendered February 24th, 1939. This Honorable Court was evidently so convinced when it wrote decision February 24th, 1939, as mentioned, it refused to write another opinion July 22nd, 1940, and wanted the Marshal to destroy Policy No. 8 611 895.

Your petitioner is convinced that this was why the ancient Roman Democracy (which we copied after 1776) first went into an Empire, then fell. The era preceding it all carries

abundant proof of the type of decisions rendered by its judicial branch of the democracy.

The Federal court, the Eighth Circuit Court of Appeals were both deceived by this defendant.

Your petitioner's purpose here is to hope and see this Honorable Court is not likewise deceived.

Here is positive proof this defendant is dishonest with its policy holders here in Missouri. I promised earlier in this petition to prove this defendant stands before your Honorable Court today with "unclean" hands.

On Page #49, printed copy writ of certiorari filed November 9th, 1940, copy served on defendant, petitioner state banks were using their monthly financial statements to depositors to carry the message "President Roosevelt and the New Deal" were "PACKING" the Supreme Court of the United States: Petitioner wrote one such bank president, resented the use of bank prospectus, also resented some insurance corporations actually telling policy holders, and even writing them the same thing. Petitioner held out to this one bank president possibility of proof which petitioner would attempt to furnish, showed an association known as the Liability Employers Association, Inc., had existed, that a New York Life departmental head was one of its charter members, petitioner believing its main purpose to be to "PACK" the jury boxes in Missouri State courts of Jackson county—greater Kansas City and not a small expanse of territory. That the bank president had not accepted petitioner's offer by November 9th, 1940. Nor has he to date let me state here.

I had the fullest confidence in this defendant when I entered Federal court, November, 1936. I had the same confidence when I came out. (See page #28 second to last paragraph, copy writ of certiorari-amendment.) Petitioner had the fullest confidence in an advertised directorate by this

defendant to work without salary, gladly inviting policy holders to write them for protection.

However, this defendant directorate disillusioned petitioner, disappointed petitioner down to the very core of his personality so petitioner started to do something about it.

He unearthed the so-called Employers Liability Association, Inc., and found a departmental head of the defendant in greater Kansas City to be a charter member.

Petitioner was then positive what the purpose of this association was, insofar as an instrument of the defendant was concerned. At least believed so. But, petitioner could not prove it. Petitioner could, of course, talk about it so let this Honorable Court decide if petitioner talked about it in the right places.

Your petitioner tried hard to have this association and its purpose given wide publicity. Your petitioner went out of his way to talk to Kansas City newspaper representatives. Those petitioner talked to wanted to co-operate apparently but their newspaper changed their minds. Nothing in the way of publicity happened.

On February 10th, 1941, less than thirty days ago something did happen.

Your petitioner had occasion about September 3rd, 1937, when a defendant director wrote petitioner his final letter (see page #28 writ of certiorari-amendment) to try and engage counsel. In writing such counsel at that time petitioner said this in one of his Exhibits. Quote

> "One word of caution. I have investigated this New York Life. One of its departmental heads in greater Kansas City was a charter member to the so-called Employers Liability Association, Inc. My conviction is this association, so far as the New York Life would be concerned, has a set purpose to "PACK" the jury boxes in Missouri State Jackson County Courts. As the New York Life directorate invite me to file suit in court, when so filed look out for a "PACKED" jury.

Don't take this case unless you desire to fight it to the bitter end. You will be fighting three billions of dollars with sixty thousand dollars of it my money. There are over sixty thousand names on the Jackson County court jury wheels, over fifty thousand of those sixty thousand employed by this so-called Employers Liability Ass'n. The New York Life intend to use federal court disagreements with Missouri state established law on disability, did so obtain with my case in federal court, 1936, and are now out to obtain Supreme Court of United States concurrance in such federal court disagreement and then put its two bulls, one with "horns" and one without "horns" back in Missouri state courts, driven out with Missouri state established law back in 1926. In the meantime this Employers Liability Association, Inc., I believe, so far is New York Life is concerned, will take care very nicely of New York Life —policy holders in state courts".

Your petitioner on February 10th, 1941, at last received some help and I hope in time for this Honorable Court.

The Honorable Judge Waltner in Jackson County, Missouri State Court rendered the following decision (quoted in excerpt) February 10th, 1941, on a change of venue case before court. Quote

1) Pronounced the Employers Liability Association, Inc., to be an organized propaganda machine, etc.

2) Writing fictional propaganda tending to spread the belief that many damaged suits are "fake" and "fraud".

3) Privately paying employe-jurors more remuneration than they would receive in legitimate service.

4) Maintaining statistical records of the performance of employe-jurors with the result of coercing verdicts.

5) This Court is convinced of the verity of affidavits which are to the effect that it is likely that a litigant, versus this defendant (Employers Liability Associa-

tion) could not obtain an impartial jury because of the defendant's influence over the inhabitants of Jackson County. Court grants change of venue".

There was but a short mention of this decision in the press. No newspaper front page captions (mention on inside sheets) and no newspaper editorials on editorial sheet.

Writeups on Roosevelt "PACKING" the Supreme Court. Well let me contrast that issue with our leading newspaper here.

Commencing with February, 1937, front page glaring headline captions daily in morning and evening papers for months, the editorial sheet filled daily with editorial write-ups, photographs, etc. It still goes on and is still mentioned. Not, of course, daily.

Not a bank prospectus, not a newspaper, not an Insurance Company writing their agents and policy holders about "PACKING" the jury boxes in Jackson County of Missouri courts.

Your petitioner even told one bank all about it (see page #49 writ of certiorari-amendment) by letter with no result.

Petitioner holds no animosity against the Honorable Federal court of November, 1936, March, 1938 and August 14th, 1939. If this defendant can "frame" over five hundred thousand people in greater Kansas City with a "PACKED" jury box in all Jackson County, State of Missouri, courts since 1935, and for the State court decision to say it is still going on even if courts did dissolve the association, this defendant with its corps of paid political attorneys surrounding every Federal judiciary court in the land can also deceive some of these Federal judiciary members.

Your petitioner's hope is the Federal judiciary will hold a convention similar to Missouri State judges back in 1926, so to speak. At least become agreed on the correct interpretation of the disability clause in an insurance policy, the

"gold mine" for unethical and dishonest insurance where courts listen to their two bulls.

Since 1776 American insurance can write an insurance policy, if it wants to, without ambiguous clauses, charge the premium it must have to be prosperous and the public will gladly pay the price.

I object as your petitioner to dishonest insurance, first influencing a man when young to put his trust in them to protect his family, then legally rob the same man when he is old and to hell with his family.

I charge here that is what this New York Life most deliberately intended to do with its ambiguously phrased policy No. 8 611 895, selling policy in Missouri until Missouri adopted State established law on disability, then getting out of Missouri with policy No. 8 611 895. But, dragging a Missouri policy holder owning such a policy from State to Federal court if he had the audacity to put this defendant in a Missouri State court with the policy as evidence.

No wonder this defendant wanted the Federal court to cite me for contempt of Federal court to appear September 30th, 1940 (see page #16 writ of certiorari-amendment), and have Marshal destroy policy No. 8 611 895 and component parts. This defendant cannot even take a chance I might prove to two other bodies which I am also before aside from Federal judiciary the defendant "fraud" policy No. 8 611 895 and component parts contain.

On page #11, second paragraph, petitioner states in printed copy of writ of certiorari-amendment petitioner advised an attorney he doubted if petitioner could engage an attorney in greater Kansas City to properly handle his case before the Federal judiciary. On September 3rd, 1937, a New York Life director wrote petitioner to take the charge made to the directorate to court (see page #28 writ of certiorari-amendment).

It is to clarify the atmosphere your petitioner shows why such statement was made. Petitioner then suspicioned the defendant, also its directorate, that it would not play "fair" and was convinced petitioner knew why.

There are over three million insurance policy holders in Missouri. This defendant was shooting at this colossal number, and add sixty-five million in the nation and using, already had used the petitioner as the victim. Petitioner had already been legally shot.

Your petitioner had already discovered why.

To obtain a Federal court disagreement with Missouri State Established Law. Defendant got it. November 23rd, 1936.

The Supreme Court of the United States then still had to be "framed". Why should petitioner not use word "framed"?

The Circuit Court of Appeals Eighth Circuit write decision February 24th, 1939, and charges the petitioner with "framing" this innocent defendant.

Petitioner here quotes charge made publicly by the Junior Missouri Senator in speaking before the United States Senate and directed directly against the Federal court who tried your petitioner's suit in equity against this defendant charging "Fraud" year 1934: Quote

Kansas City Star, February 15th, 1938.

A Bitter Truman.

Quote in excerpt.

"The federal court at Kansas City is presided over by two as violently partisan judges as ever have sat on a federal bench since the federalistic judges of Jefferson's Administration. They are Merrill E. Otis and Albert L. Reeves.

"Lawyers in Kansas City have been afraid to act as defendant attorneys in these cases because it was in-

timated plainly to them that the federal judges did not consider it the proper thing to do. Lawyers all expect to practice in the federal court. In fact a good friend of mine told me he didn't dare act as a defendant lawyer in these cases because he had important matters pending in Otis' Court".

Your petitioner has remained within the scope in all the foregoing on what is public knowledge. Petitioner never did have any opinion, nor made any expressions anywhere on the above quotation.

That your petitioner has said nothing here petitioner did not say to the Honorable Federal Judge Merrill E. Otis direct when cited for contempt of Federal court, September 30th, 1940, (see page #16 writ of certiorari-amendment) is evidenced by the fact petitioner appeared in Federal court, as ordered, and handed to His Honor his prepared petition from which a great deal of the foregoing petition has been copied here. His Honor accepted petitioner's petition, defendant withdrew his motion and His Honor handed back to petitioner his petition without reading.

The Federal court of 1936 was deceived "framed" by this defendant.

Your petitioner is after this defendant, not any member of the Federal judiciary who have my deepest respect. However, when the Federal judiciary undertakes to protect this defendant, compels petitioner to try by "law" the Federal judiciary rather than this defendant, such members of the Federal judiciary can well handle themselves. They do not require this defendant to advise them petitioner is discourteous to His Honor or that when he does appear before His Honor petitioner failed to wash his hands. Your petitioner assures this Honorable Court his hands are not dirty, but charges here that this defendant's hands to be filthy.

Your petitioner prays this Honorable Court will overrule the lower courts and permit your petitioner to try this defendant on the issues of this case.

MAJOR S. K TOUCEY,
Petitioner.

Address #131 West 61st, Street Terrace, Kansas City, Missouri.

(3057)

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 587

SAMUEL R. TOUCEY,

Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITIONER'S SUPPLEMENTAL BRIEF.

SAMUEL R. TOUCEY,
Pro se.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 587

SAMUEL R. TOUCEY,

Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY,

Respondent.

SUPPLEMENT TO BRIEF IN ARGUMENT BEFORE THE UNITED STATES.

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

In the conduct of trial and decision rendered, November 23rd, 1936, Federal court failed in its duty.

Respondent's brief served on your petitioner today, page #14, appears last part of Federal court's decision on *disability* issue. Below petitioner quotes first part:

> "He certainly is *totally disabled,* I would think, from carrying on the same kind of business enterprise as that which he was engaged and at which he was very successful. He cannot do that nor anything of that character, etc."

As your petitioner stated in Brief in Argument, page one, fifth paragraph: "*It never was nor never has been a question of your petitioner knowing the correct interpretation of this policy's disability clause. It has always been a question of defendant advising petitioner terms of policy*". *Never an issue petitioner not knowing terms.*

Respondent's brief, page #14, last paragraph, and directly below excerpt quotation from Federal court's decision on *issue of disability,* states:

> "To prove his right to a premium waiver and reinstatement, Toucey had to prove 'FRAUD' and his *total and permanent* disability, etc.".

Your petitioner did prove to the Federal court his "*total and permanent disability for his regular line of work.*" (All required to prove under Missouri State established law.)

Petition in suit in equity charged "FRAUD", year 1934 against this defendant. *Federal court ruled* "NO FRAUD."

An action in equity draws to it all issues, equitable and legal, essential to complete adjudication of the issues between parties. As a concomitant of the rule, it is clearly established that when a court in equity determines the equitable issues adversely to the petitioner, whether for lack of proper averment or lack of proof, that court loses jurisdiction to determine the legal issues. *The leading precedent case is decision by the Supreme Court itself in Dowell* v. *Mitchell,* 105 U. S. 430, 26 L. Ed. 1142.

If the opinion of the Eighth Circuit Court of Appeals in this case is to stand, Section 379, U. S. C. A., Title 28 does not mean what it says, there is no limitation upon the right of a Federal court to stay proceedings in a State court and *that section of the statutes mean nothing, has been repealed, and is a dead letter.*

Federal court, for some reason, refused to decide the issue of "FRAUD" charged in petition in suit in equity, year 1934. Its own rendered decision is proof:

> "Now, I do not intend to pass upon the issue of fact as to whether the plaintiff mailed the letters described in evidence as Exhibits 3 and 4, and whether the defendant received those letters. The testimony of the plaintiff and his secretary was to the effect that the two letters were mailed, and I have no reason to doubt that they were mailed. These witnesses, at least one of them, the plaintiff, was, of course, interested in the results of the case, but I am sure that neither he nor his secretary would swear falsely about a fact of this kind. While I do not make any decision as to that issue, I have no doubt at all that the letters were mailed as the witnesses testified that they were mailed. Whether they were received I do not know."

These two particular letters referred to in Federal court's decision, quoted in excerpt above, also several other letters appear in transcript of record in above case.

Petitioner hopes, therefore, defendant (who again charges petitioner with violation of rule #27 appearing on page #53 respondent's brief) will admit I can talk about these two letters to this Honorable Court. Reference to them below.

The first letter dated June 29th, 1934 (Exhibit #3 in Federal court), appears in full on page #67 petition for writ of certiorari, Supreme Court printed copy.

The second letter dated August 11th, 1934 (Exhibit #4 in Federal court), appears on page #72 petition for writ of certiorari, Supreme Court printed copy.

On letter One (June 29th, 1934) petitioner directs this Honorable Court's attention to origin, history and purpose of this letter starting on page #25, last paragraph, petition

for writ of certiorari-amendment, filed with Supreme Court, November 9th, 1940, and ending page #28, third paragraph.

On-letter Two (August 11th, 1934) petitioner directs Supreme Court's attention to origin, history and purpose of this letter starting third paragraph, page #28, and ending page #33, second paragraph writ of certiorari-amendment filed with Supreme Court November 9th, 1940.

These are the two letters mentioned as Federal court's exhibit #3 and #4 in excerpt of Federal court's decision quoted on this page, paragraph three.

These two letters based petitioner's charge of "FRAUD" in suit in equity filed in Missouri State Court, October, 1935. One year and one month was consumed by defendant to drag this equity suit, charging "FRAUD" year 1934, across the street from Missouri State Court to Federal court for trial.

Equity suit charging "FRAUD" year 1934, went to trial in Federal court, morning November 18th, 1936, and ended at evening November 23rd, 1936, when Federal court rendered decision.

Less than one day was devoted by Federal court to petition in suit in equity, charging "FRAUD", year 1934. Ruled "NO FRAUD".

Over three days was consumed by Federal court to reach and render decision on disability clause in defendant policy No. 8 611 895. Federal court had no legal right to pass on issue.

Federal court has always been your petitioner's best witness, and by written decision, Federal court, for some reason, did not elect to pass on the two letters (June 29th, 1934, and August 11th, 1934). It was the full duty of Federal court in the conduct of trial (November, 1936) to convene a jury, give the jury full testimony and evidence (Exhibits #3 and #4 before Federal court—letters June

29th, 1934 and August 11th, 1934) and let their decision be what it may.

This the Federal court did not do.

This was the Federal court trial on petition of suit in equity, petitioner charging defendant "FRAUD" *year 1934.*

When the Federal court entered temporary injunction stopping Missouri State jury trial on same suit re-filed in Missouri State court (March, 1938) Federal court wrote an opinion. (See page #83 petition for writ of certiorari filed November 9th, 1940, printed copy.)

Federal court, quoted in excerpt, states:

> "Had there been an appeal Circuit Court of Appeals would have heard case de novo.
>
> It might well have disagreed with our finding of fact Number One (*petition in suit of equity,* "FRAUD", *1934*).
>
> And nevertheless affirm[illegible] decree because of finding of fact Number Two (*[illegible]on on disability clause in defendant policy No. [illegible]895*)."

On transcript of record in this case, petition of defendant, page #17, Supreme Court of the United States printed copy, end of page #17, defendant states:

> "On September 26th, 1934, said policy No. 8 611 895 was reduced as aforesaid, that thereafter and on October 2nd, 1934, the last day of grace in which, and, by the terms of said policy plaintiff was entitled to pay the premium thereon falling due on said October 2nd, plaintiff Toucey delivered to defendant his check for Two Hundred Eighty Nine and 25/100 ($289.25) which was deposited by defendant in bank and was thereafter returned to defendant by the bank not honored, and that thereupon said policy lapsed for failure to pay said premium due October 2nd, 1934; that on November 21, 1934, defendant sent said Toucey a letter enclosing said check and notified said Toucey that because said check

had been returned by the bank not honored said policy had lapsed on the books of the company; that plaintiff never paid said premium and never reinstated said policy, etc."

It is all very well for defendant to charge petitioner with violation of Rule #27 and other rules and regulations of the Federal judiciary in what facts petitioner can state to this Honorable Court.

This Honorable Court can change Federal judiciary rules and regulations at will.

This Honorable Court, however, cannot change the Constitution of the United States at will, nor by decision.

The Federal court of November, 1936, did change the Constitution, and by decision, in the conduct of trial and decision rendered. Again the Federal court of 1936, for a second time in this case, changed the Constitution of the United States and laws thereunder and by decision when it entered Federal court temporary injunction (March, 1938) stopping Missouri State court jury trial of the same suit in equity before this Federal court for trial, 1936, charging "FRAUD" year 1934.

The Circuit Court of Appeals in decision rendered February 24th, 1939, concurred with Federal court, first by trial and decision on petition in suit for equity, charging "FRAUD," year 1934, Federal court could change the Constitution of the United States and Supreme Court law thereunder; and again Federal court could change the Constitution of the United States by entering Federal court temporary injunction stopping Missouri State Court jury trial of same 1935 suit in equity, charging "FRAUD," year 1934, on March, 1938, also Supreme Court law thereunder.

Both the Federal Court and the Circuit Court of Appeals Eighth Circuit disregarded Section 379, Title 28, U. S. C. A., Section 265, Judicial Code and flagrantly so.

All Federal court decisions, injunctions, court's final decree is definite proof of this.

The one decision rendered by Circuit Court of Appeals Eighth Circuit, is definite proof of this.

Not a single one controlling precedent case is cited by either Federal judiciary court in their decisions justifying their findings by decision.

BOTH FEDERAL JUDICIARY COURTS ABOVE MENTIONED SAY, AND BY DECISION, THAT—

> *Section 379-265 do not mean what they say, that there is no limitation on the right of a Federal court to stay proceedings in a State court and that these sections of the statutes mean nothing, have been repealed and are a dead letter.*

Your Petitioner Also Says Here Add the Constitution.

It is for this reason, rule #27 or all Rules regardless, when your petitioner prayed the Supreme Court of the United States to grant permission, by application for writ of certiorari, to put before this Honorable Court what this litigation since October, 1935, was all about.

In one such petition petitioner said to the Supreme Court, quoted the form executed by the Bank acknowledging that on November 2nd, 1934, petitioner instructed the Bank not to honor his check drawn in favor of defendant November 2nd, 1934, amount $289.25, if presented for payment.

That the defendant run this check through the bank on four different dates, the bank declined payment on each date and notified your petitioner finally in writing his order to stop payment on check had been complied with and asking your petitioner if he cared to renew "stop payment order" on this check.

Let your petitioner here refer this Honorable Court again to Federal court's decision, quoted in excerpt, third paragraph, page three of this supplemental brief in argument.

Federal Court Exhibit #4 referred to is petitioner's letter to this defendant's Home Office dated August 11th, 1934, and enclosing defendant letters to petitioner from its Kansas City Branch Office dated July 25th, 1934, (See page #68 and #69, printed copy of writ of certiorari-amendment) and also enclosing defendant's Kansas City Branch office letter to petitioner dated August 10th, 1934, (See page #70 and #71, printed copy writ of certiorari-amendment).

Your petitioner stop payment to his check rendered to this defendant November 2nd, 1934, under protest and only given to defendant on an urgent plea to give it, that check would be held in cash drawer until the defendant New York City Office replied to petitioner to his letter to them dated August 11th, 1934, which the defendant signer of defendant letters to your petitioner dated July 25th, 1934, and August 10th, 1934, knew had been sent by petitioner, and on his request, to the defendant New York City office on August 11th, 1934, with petitioner's request that the errors between the defendant letters to petitioner dated July 25th, 1934, and August 10th, 1934, be adjusted. This defendant's Kansas City office knew that when petitioner paid on August 14th, 1934, premium due under protest on policy No. 8 611 895, petitioner would not, when another premium fell due, pay it until the defendant adjusted the errors between these two letters here mentioned.

In fact defendant signer of these two letters took from petitioner manifold carbon of petitioner's letter to defendant's Home Office dated August 11th, 1934, (Exhibit #4 in Federal court) and read the same, handing it back to petitioner, and on August 14th, 1934, petitioner entered defendant's Kansas City office and paid premium on policy No. 8 611 895, under protest, demanded by defendant's letter to

petitioner dated August 10th, 1934, (See page #70 and #71, printed copy writ of certiorari-amendment).

Defendant's quotation from Transcript of record in this case, page #17, end of page, quoted in excerpt middle of page #3 of this supplemental brief in argument is all "bunk" if this Honorable Court will excuse railroad and army common vernacular. Defendant purposely avoids stating their letter to petitioner was sent Registered mail; and law requires it be sent Registered mail.

The Post Office card was evidence in Federal court trial and petitioner did not sign for this registered letter, first sent to a wrong address and deliberately so by defendant, as on September 7th, 1934, the Cashier of defendant who mailed this registered letter to petitioner late in November, 1934, wrote the petitioner at his correct address, and wrote petitioner also in connection with the petitioner's letter to the defendant's Home Office at New York City's address dated August 11th, 1934, mentioned as Exhibit #4 in Federal court's decision quoted in excerpt page two of this supplemental brief, and which appears in full on page #72 of printed copy of writ of certiorari-amendment.

All the foregoing was testified to by petitioner in Federal court trial.

Tersely all the Circuit Court of Appeals Eighth Circuit decision rendered February 24th, 1939, says is this—In phraseology of petitioner.

"Mr. Toucey could not get back in court as no "FRAUD" had been proven; but Mr. Toucey could get back in Court on issue of *Disability*. Because the federal judiciary operates to protect this honest defendant Mr. Toucey's Missouri State court suit in law cannot be permitted: That Mr. Toucey "has ingeniously made out on the face of a petition in the state court by simply omitting the facts as they were established between the parties in the federal equity suit on the issue of *Disability* with the sole purpose of getting back

in court and "frame" this honest defendant on an issue of "FRAUD."

Federal court decision was not appealed, nor was it before the Circuit Court of Appeals Eighth Circuit on appeal.

Federal Court temporary injunction (March, 1938) permanent injunction and court's final decree (August 14th, 1939) were before the Circuit Court of Appeals Eighth Circuit on appeal.

Federal Court never had a legal right under the Constitution and laws thereunder to enter injunctions thus on appeal, nor did the Circuit Court of Appeals Eighth Circuit ever have a legal right to concur with Federal court on appeals before it. I will not requote here the Supreme Court of the United States law plainly saying so. It appears on page #4 this supplemental brief in argument.

Respondent's Brief of #54 pages is very nicely prepared and served on petitioner today. Petitioner likewise will serve copy of this supplemental brief in argument on defendant today.

Respondent's brief is very interesting and the history it contains on Federal judiciary deliberations fascinating, also educational.

However, defendant's previous "Brief of Respondent in opposition to writ of certiorari" petitioner is charged "with not conforming to Rule #38 of the Revised Rules of this Court adopted February 13th, 1938. But, on page #5 of this brief defendant states that the only part of petitioner's typewritten petition for writ of certiorari copied the petition (compiled by my then lawyer) in cause #897 with which the Supreme Court of the United States would not let petitioner in "under the tent". It is plain your petitioner's typewritten petition in writ of certiorari filed November 9th, 1940, should result in petitioner being thrown out the back door this time, while he went out the front door last time. In other words, petitioner had a good lawyer

when before this Honorable Court with cause #897 who had done all he could for petitioner, but as petitioner was wrong, the framers of the Constitution had petitioner in mind when framing the Constitution, petitioner was "through" and did not know it.

The only thing wrong with petitioner today seems to be petitioner lost his lawyer. Defendant is handicapped and does not understand petitioner's phraseologies or expressions.

Apparently the defendant directorate held the same view, believed that if petitioner accepted their invitation "to go back to court" he would get thrown out for not knowing legal expressions. Defendant must have entertained some fear, however, as the preparation of their colossal number of petitions and briefs prove when petitioner did again appear in court December, 1938.

Defendant states on page #15 of respondent's brief today:

> "The reasoning of the Eighth Circuit Court on this point is unanswerable. Judge Woodrough said, etc."

Petitioner answers Judge Woodrough's decision on page #4 of this supplemental brief in argument to best of his ability, and hopes politely and in a dignified legal manner. Also on page #5.

From the historic treaties on the use of writ of injunction so ably prepared by defendant, page #17 respondent's brief petitioner acknowledges here, it seems someone concludes in Henry VIII's time of England, Cardinal Wolsey was impeached due to his mishandling.

Petitioner has always believed Cardinal Wolsey opposed who was to be King Henry's second Queen and a "woman's scorn" when in full glory of her power as Queen decided to behead Cardinal Wolsey. The Cardinal died, however, and the Queen herself later was beheaded.

FILE COPY

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 16

SAMUEL R. TOUCEY,

Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY,
A CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER ON REARGUMENT.

SAMUEL R. TOUCEY,
Pro se.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 16

SAMUEL R. TOUCEY,

Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY,

A CORPORATION.

BRIEF IN ARGUMENT BEFORE THE SUPREME COURT OF THE UNITED STATES.

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Comes now your petitioner, and if so permitted, states.

In above cause Supreme Court of the United States entered order by an equally divided court April 7th, 1941; motion for rehearing filed with Supreme Court April 14th, 1941, rehearing motion granted by Court April 28th, 1941, and case set for argument October 13th, 1941.

Said motion for rehearing by petitioner thus granted by the Court (filed April 14th, 1941) set out arguments in order herein named) (1) Why did the State of Missouri adopt Missouri State Established Law legally interpreting the insurance policy disability clause; (2) pointing out to

the Supreme Court of the United States how *Federal trial court's decision and Federal court's written opinions in entering temporary injunction, permanent injunction, court's final decree was contrary to Missouri State Established Law*; and (3) pointing to United States Supreme Court governing laws when the Federal court, with petition in equity before it charging defendant fraud, year 1934, when the Federal court passed on issue of fraud, Federal court lost jurisdiction to pass on issue of policy disability.

Your petitioner here respectfully prays the Honorable Supreme Court of the United States will now accept petitioner's final brief in argument, and unless the defendant file his Opposition Brief and your petitioner deems it necessary to make further argument, this will conclude petitioner's arguments.

In the order named on page one, paragraph three:

The Controlling Laws of the State of Missouri Commonly Termed Missouri State Established Law to Govern Legal Interpretation of Insurance Policy Disability Clause.

Within the State of Missouri, and for more than the life time of one generation, Missouri State courts were in open conflict on the legal interpretation of insurance policy clause. Public charges were made Missouri courts had become contaminated by *insurance corruption.* By the power of the Missouri citizens *vote,* judges appeared on the bench of Missouri State courts and finally gave the uniform answer, the *Controlling Law of Missouri—Missouri State Established Law,* thus legally and uniformly interpreting the insurance policy disability clause. This drove out of Missouri State courts such insurance corporations who *sold their wares* to Missouri citizens with so-called *ambiguous* insurance policy clauses in their policies; *and among such Insurance Corporations was this defendant thus driven out*

of Missouri courts, and for the said reason stated, with its form policy identically the same, with the ambiguous disability clause set out in policy identically the same as set out in defendant policy No. 8,611,895, developing a legal imbroglio now before the United States Supreme Court to decide and render justice. Missouri courts had rid themselves of such legal imbroglios on the issue of policy disability clause, and the record held within Missouri courts is ample proof why this defendant itself elected to transfer all this legal conflict and confusion from Missouri State court over into Federal court; and with this defendant *one hope* which your petitioner hopes to amply point to before concluding this argument.

Suit in Equity was filed in Missouri State court, October, 1935, charging fraud, year 1934, by defendant in reducing policy Number 8,611,895 from its original amount of fifty thousand dollars ($50.000.00) to twenty-five thousand dollars ($25,000.00) asking reinstatement of policy to original amount. The origin, the life of the Suit in Equity was fraud. Had the Federal court ruled fraud did occur in Equity Suit, as charged, then the court would determine if petitioner was permanently and totally disabled, waiver of premium under disability policy clause, what, if any, provision in policy contract which conditioned petitioner to notify this defendant *Home Office of his disability*, and did petitioner observe such condition if set out in policy, etc. This defendant transferred said Suit in Equity, charging fraud, from Missouri State court over into Federal court and Equity Suit went to trial November, 1936.

Before Federal court, your petitioner's controlling case was *Mutual Life Insurance Company of New York, Petitioner* vs. *Johnson*, 293, U. S. 335, 340, decision rendered by the United States Supreme Court, argued November 15th, 1934, decided December 3d, 1934, Mr. Justice Cardozo delivered opinion of Court. Federal trial court entered its

written opinion on said United States Supreme Court law which will be quoted in full, and in its proper place, below.

The Federal court rendered its decision at close of trial (November 23d, 1936) and by said decision *disagreed* with *Missouri State Established Law On Insurance Policy Disability Clause As Set Out In Defendant Policy No. 8,611,895 contrary* to well established *Constitutional law* governing the adjudication of a suit in equity charging fraud, decision ruling there was *no defendant fraud* as petition in suit of equity charged.

Thusly the Federal court received into the Federal judiciary with wide open arms, in conflict with Missouri State Established Law on insurance policy disability clause; and harbored before the Federal judiciary Bar of Justice what the State of Missouri judges, and by their Missouri court rendered decisions, had driven out of the State of Missouri, generations of State court division and legal conflict. The "gold mine" for dishonest insurance in Missouri had been the *ambiguous* insurance policy disability clause and its consequent legal imbroglios. Your petitioner appreciates why dishonest insurance would want to retain it, and in Missouri, and be protected by law in so doing, but believed it to be a plain citizens duty thus caught within the wringer of the Federal judiciary legal rollers to fight the issue to the bitter end, not for your petitioner's own benefit as it may be he is beyond such benefit, but for the benefit of his family and for the benefit of the some three millions of insurance policy holders in Missouri. This Honorable Supreme Court of the United States can best judge how petitioner's legal fight and effort, without legal mind, without previous legal experience or contact has been carried, fairly or unfairly, and also without a previous court experience in any court of the land in a period of more than three score and ten.

In corroboration of the legal Missouri Court decisions in support of the foregoing perhaps it will be more than sufficient here to but quote decision rendered by the Court of Appeals of Missouri in year 1905; and also decision rendered by the Supreme Court of Missouri, Division Number 1, in year 1937, (a span of thirty-two years) both on the issue of the insurance policy DISABILITY clause and both in support of a correct and fair legal interpretation of the insurance policy disability clause—Missouri State Established law. It is deemed unnecessary to mention or quote conflicting or opposing Missouri Court decisions in opposition to such Missouri Court decisions and conclusions as set out in said 1905 and 1937 Missouri Court decisions.

1905 (113 Mo. app. 622).

James v. United States Casualty Co. Kansas City Court of Appeals, S. W. Reporter, Mo., decisions only, 87 and 88, page 125. *June 5th, 1905.*

1) Appeal—theory of trial. Appeal from Circuit Court, Jackson County.

2) Accident insurance. Risks insured.

Insured was a Queensware Merchant, "the policy should be regarded as insuring against inability to substantially perform the general occupation of Queensware Merchant, and not merely against inability to perform office and traveling. Insured injured by fall from street car and suffered partial injury.

3) A provision in an accident policy that it insured against "total" inability to perform "any part of the duties" of insured, who was a merchant, cannot be construed literally, but means inability to perform any substantial part of the business.

Quote from decision in excerpt:

It cannot be that the *parties intended* that before an *insured could recover on the policy he should lie the full*

period of his injury in a state of coma. To interpret the clause in its contractual sense, as defendant seeks to have us do, would render the contract utterly useless to an insured, and would be nothing short, practically speaking, of collecting a premium without rendering a consideration. We, therefore, find ourselves, driven back to the position taken by the authorities on the construction of the first part of the clause, viz: that the disability meant is a disability as to the performance of any substantial part of the business.

Judgment Affirmed. All concur.

Heald v. *Aetna Life Insurance Company, Hartford, Conn.*, S. W. Rep. 104-105, S. W. (2d) Missouri Cases, page 379.

No. 34830.

SUPREME COURT OF MISSOURI, DIVISION NUMBER 1.

March 17th, 1937.

Rehearing denied April 21, 1937.

1) Appeal and error—*861.

Where Court of Appeals certified decision to Supreme Court on ground that it was in conflict with decisions of another Court of Appeals, cause was in Supreme Court for hearing and determination in like manner as in case of jurisdiction obtained by ordinary appellate process, but Supreme Court was at liberty to avail itself of such portions of certified opinion as it might choose (Const. Amend. 1884, *6).

2) Insurance—146(1).

Insurance policy must be enforced as written where language is plain and unequivocal, but where language is *AMBIGUOUS*, its meaning is to be determined by judicial construction.

3) Insurance—146(3).

Construction of insurance contract *most favorable to insured* must be adopted where contract is *AMBIGUOUS.*

4) Insurance—524.

Provision in accident policy that *total disability benefits* could be *recovered* only if *injury prevented insured from performing "any and every duty" pertaining to his occupation, with respect of the phrase "any and every" was invalid, and the provision containing it must be construed so as to make the provision effective.*

5) Insurance—516-524.

"TOTAL DISABILITY" contemplated by an accident policy, *OR THE DISABILITY CLAUSE OF LIFE POLICY*, does not mean, as its literal interpretation would require, a state of absolute helplessness, but means inability to do all the substantial and material acts necessary to the prosecution of the insured's, or, in many instances, *any*, business or occupation, in the customary and usual manner.

11) Insurance—668(11).

In action on accident policy, whether insured, who was a butcher with duties which consisted of waiting on customers, cutting meat, and buying meat from packing houses, was totally disabled by *loss of thumb* and resultant painful conditions of hand held for jury, where insured was unable to properly perform predominant duty of meat cutting.

In an action by jury plaintiff had a verdict and judgment of $525. The defendant appealed to the Kansas City Court of Appeals. That court certified its decision to this court pursuant to article 6, section 6, Amendment of 1884 of the Constitution of the state, on the ground that such decision was in conflict with decisions of the St. Louis and Springfield Courts of Appeals.

Quote in excerpt from decision, page 382 (2-5).

"Such is the rule, but to that rule there is an equally well settled exception, viz: If the language is *ambiguous*, i.e., open to different interpretations, its meaning is to be interpreted (determined) by judicial construction, *and in insurance contracts the construction most favorable to the insured must be adopted.* State ex rel., Security Ins. Co., Allen et al., 305 Mo. 607, loc. cit., 614, 267 S. W. 379, 381. The rule prevailing in this state and in most other jurisdictions is to the effect that a provision such as the one before us, with respect of the phrase "any and every duty" "*would render the contract utterly useless to an assured and would be nothing short, practically speaking, of collecting a premium without rendering a consideration insofar as the total disability clause is concerned.*"

Numerous court decisions quoted as to index in the above rendered Supreme Court of Missouri decision, notably the

Rickey v. *New York Life Insurance Corporation*, No. 22787, S. W. Reporter, 2d series, # 71. page 88. *Court of Appeals, Missouri, May 8th, 1934.*

The judgment of the Circuit Court is affirmed.

All concur.

Your petitioner quotes in the foregoing the 1905 and 1937 Missouri State Court decisions rendered on the issue of the insurance policy disability clause in proof that the insurance policy disability clause, in Missouri, for more than the lifetime of one generation, was a "*GOLD MINE*" for dishonest insurance.

Petitioner in motion for rehearing granted by the Supreme Court of the United States filed April 17th, 1941, page four, quotes the *Rickey* v. *New York Life Insurance Corporation*, No. 22787, decision rendered by Court of Appeals, Missouri May 8th, 1934. It was in support of petitioner's contention that so long as dishonest insurance, under the

cloak of the insurance policy disability clause, can influence the LAW, be it state or nation, to support their contention their own concocted AMBIGUOUS insurance policy disability clauses are to be legally construed by court decision as *NOT AMBIGUOUS*, just so long will the public, and in both state and nation, be so exploited as in the case of your petitioner in the above entitled cause.

It is a significant fact, and your petitioner particularly calls this Honorable Supreme Court of the United States' attention thereto, both the 1905 and 1937 Missouri rendered decisions above use practically the same identical phraseology *"would render the contract utterly useless to an insured and would be nothing short, practically speaking, of collecting a premium without rendering A CONSIDERATION INSOFAR AS THE TOTAL DISABILITY CLAUSE IS CONCERNED.*

In the foregoing petitioner's final brief in argument on rehearing granted by Supreme Court of the United States, as set out on page one, paragraph three, in order named, first effort would be to show the controlling law of Missouri governing the AMBIGUOUS insurance policy disability clause, and out of said legal interpretation by Missouri Courts was born what is here known as the Missouri Established Law. With petitioner's necessity to yet mention herein argument against the Federal court decision, written opinions, injunctions, court's final decree as contrary to not only the controlling LAW of Missouri, but all contrary to United States Supreme Court LAWS themselves, will not pause longer dealing with Missouri controlling LAWS, but go on to the next. Before leaving the argument on the JUSTICE under *Missouri controlling LAW* on the *legal interpretation* of the *insurance policy clause*, fair to both policy holders and their insurance corporations, desire to point out to the Honorable Supreme Court of the United States this fact:

In the *Rickey* v. *New York Life* case, Number 22787, S. W. Reporter, 2d series # 71, page # 88, decision rendered by the Court of Appeals, Missouri, *May 8th, 1934,* (as quoted in excerpt by petitioner in motion for rehearing filed with Supreme Court of the United States by petitioner April 17th, 1941, page 4) said *Rickey* v. *New York Life* case was before the Supreme Court of Missouri cited as precedent case and mentioned by the Missouri Supreme Court in decision rendered as quoted in excerpt, page FIVE of foregoing brief.

This *defendant policy Number 8 611 895* sold to your petitioner in *1924, evidence before the Federal court in trial, and specifically referred to by rendered Federal court decision* November 23d, 1936, is the *same identical form defendant policy with the same identical disability clause contained therein as involved in the Rickey vs. New York Life case*, number 22787, *decision rendered thereon by Court of Appeals, Missouri,* May 8th, 1934, the controlling Missouri LAW previous thereto and since. Here the Missouri Court said—"In determining whether trial court should have sustained defendant's demurrer to evidence, Plaintiff's evidence must be deemed true, defendant's contradictory evidence must be disregarded, and plaintiff must be given benefit of all reasonable and favorable inferences arising from evidence". And the Missouri Court, in same decision, also said—quote

> "Having in mind the foregoing rules, can it be said that plaintiff, by his extraordinary efforts to make a living for himself and family, thereby furnishing evidence which, as a matter of LAW, will defeat his claim for disability benefits?".

In the decision rendered by the Supreme Court of Missouri, quoted in excerpt, page Five foregoing brief in argument, in the precise language contained in this Missouri

Supreme Court's decision on the *ambiguous* insurance policy clause appears quoted starting with last paragraph, continued on page Six of brief.

The controlling Laws of Missouri definitely and legally determined, and by court decision, what the insurance policy disability *ambiguous* clause was, and the Court of Appeals in Missouri in the Rickey vs. New York Life case number 22787, decision rendered May 8th, 1934, thus spoke plainly the controlling Law of Missouri governing legally in Missouri on May 8th, 1934, before and since.

Missouri Courts thus, and by rendered court decisions, legally declare the disability clause in this defendant's policy Number 8,611,895, sold to your petitioner by defendant in 1924 to be *ambiguous;* but the federal trial court, first by its rendered federal court decision November 23d, 1936, claims it to be the Law the disability clause in petitioner's defendant policy Number 8,611,895 is *not ambiguous;* and the same federal trial court and by its written opinion on December 3d, 1936, having before *federal court* the *controlling Supreme Court of the United States decision* (Mutual Life Insurance Company of New York vs. Johnson, 293, U. S. 335, 340) Supreme Court decision written by Mr. Justice Cardozo, December 3d, 1934, here the federal court written opinion claims the Supreme Court of the United States controlling case does not apply, analyzing the Supreme Court of the United States control case before it, and here thus cited, that the policy clause on disability in policy issued by this defendant to petitioner Number 8,611,895 in above entitled cause *not to be ambiguous*, setting out to prove in such written opinion by making a comparison—quote "The cat is black, we would not think it was *ambiguous* and of doubtful meaning even if five hundred men declared that what really was meant is—The Cat is White".

As to whether the *Disability Clause* in the insurance policy was *Ambiguous* and subject to a controversy where the courts of the country were arrayed in opposing groups, while this perhaps was true in the era of "dark ages" in Missouri (also Virginia and other states) by the year 1936 the "*Liberals*" won, and for a period of years before 1936 in Missouri, also Virginia, as the *Controlling Law* in Missouri and in Virginia declared the *Disability Clause* in insurance policy was *Ambiguous.*

The *Controlling* decision by the United States Supreme Court was—Mutual Life Insurance Campany of New York v. Johnson, 293 U. S. 335, 340—rendered December 3rd., 1934, and fully supported the *Controlling Law* of Missouri existing for long years previous thereto, and also as well the *Controlling Law* of Virginia. It had its beginning in Virginia.

A Federal court for the Western District of Virginia rendered decision in favor of defendant insurance and declared the *Law To Be* the insurance policy clause was *Not Ambiguous.* On appeal by petitioner the Circuit Court of Appeals Fourth Circuit over-ruled Federal court, reversed the judgment and remanded the case for re-trial. On appeal by defendant insurance the Supreme Court of the United States rendered decision and affirmed decision by Circuit Court of Appeals.

The Federal court for the Western District of Missouri, and with this defendant, together with its issued policy Number 8,611,895 before Federal court as evidence, also before the same Federal court the *Controlling Law* of Missouri, together with the *Controlling Law* by decision rendered by the United States Supreme Court coming out of Virginia, as above, rendered Federal court decision November 23rd., 1936, declaring it to be defendant disability policy clause in policy No. 8,611,895 was *Not Ambiguous,* and on December 3rd., 1936, the same Federal court wrote

its opinion analyzing United States Supreme Court decision written by Mr. Justice Cardozo, as above, and ruled said decision did not apply in above entitled cause.

The Federal court thus disagreed by decision with the Missouri State established Law on the insurance policy disability clause, in fact ignored the *Controlling Law* governing in Missouri. *Exactly what a Federal court ruled in Virginia*, but before the Federal court for the Western District of Missouri was defendant policy No. 8,611,895 in above cause which same form policy, *with the same identical disability clause*, had been before Missouri courts over a long period of years, in fact Missouri court juries had declared its disability policy clause to be *Ambiguous* let alone a continuous stream of Missouri court decisions in the same litigagation before Missouri courts many, many years (*Rickey* v. *New York Life Insurance Corporation*, Number 22787, S. W. Reporter, 2d series #71, page #88, decision rendered Missouri Court of Appeals May 8th, 1934). It does not matter, nor can it now be an issue, what consideration the *Controlling Laws of Missouri* received before Federal court trial, decision rendered November 23rd., 1936. The written opinion entered by Federal court December 3rd., 1936, clearly states Federal court was not bound to follow the Missouri Law. Of course, the Federal court did not, nor the *Virginia Controlling Law*, nor was the Federal court bound to do so; but with the United States Supreme Court *Controlling Law*, the subject of Federals court's analysis in written opinion December 3rd., 1936, surely this decision, in *Declaring* the Supreme Court of the United States—*"We Yield to the Judges of Virginia Expounding a Virginia Policy and Adjudging its Effect"*, it would seem if the Supreme Court of the United States was big enough to recognize the *Justice* to the State citizen by observing the *Controlling State Law*, the Federal court for the Western District of Missouri should have been big enough also as

a Federal court in Virginia refused, by decision, to observe the Virginia *Controlling Law*, but there both the Circuit Court of Appeals Fourth Circuit and the United States Supreme Court did not agree, by decision, with said Federal court. If not in Virginia, why not Missouri.

Federal court rendered decision November 23rd., 1936, and Federal court written opinion December 3rd., 1936, is fully analyzed below by your petitioner, opinion quoted in full on pages 37-40 below.

Decision rendered by the United States Supreme Court as referred to above quoted on pages 53-55 below.

On the insurance *Disability* policy clause in policy No. 8,611,895 in the above entitled cause said Federal court's decision and written opinion (year 1936) can only mean it to be the Law of the United States the policy disability clause is *Not Ambiguous*, exceedingly *"Fair"* to policy holder who, *if ever injured or disabled must remain in a state of coma, on a bed if he has one before the insurance company pay disability benefits as setout in policy.* The fact policy holder (as in the case of your petitioner here) paid this defendant well over *Fifty Thousand Dollars Cash*, never received one penny back, was charged by defendant with *"Unclean Hands"* before the Federal court trial and perhaps because defendant was brought into a Missouri State Court to determine why this defendant collected this sum over *Fifty Thousand Dollars*, to explain to court and Jury "What For", this defendant transfers your petitioner from Missouri State Court over into Federal court, tried without jury, and what the Federal court believed to be the Law under the Constitution of the United States appears set out in Federal court's decision rendered November 23rd., 1936, and written opinion December 3rd., 1936, latter quoted below pages 37-40 declaring policy clause on disability was *Not Ambiguous* and under

the Law this was it, provisions covered by decision rendered.

Your petitioner's best reply to it all is the 1905 Missouri court's decision set out on page five in foregoing argument; and also the 1937 Missouri Supreme Court's decision set-out on page five of foregoing argument. Here, spanning a period of Thirty Two Years between decisions rendered both Missouri courts, on the *Ambiguous* insurance *Disability Policy Clause* said— *"to interpret the clause in the contractural sense, as the defendant seeks to have us do, would render the contract utterly useless to the insured, and would be nothing short, practically speaking, of collecting a premium without rendering a consideration"*. In substantially the same precise language the 1905 and 1937 Missouri Courts spoke. The United States Supreme Court said—*"Yield to the Judges of Missouri in Expounding a Missouri Policy and Adjudging its Effect"*, as while here your petitioner transposes the phraseology (injecting Missouri instead of Virginia) this is what the Supreme Court of the United States meant.

The above entitled cause had its beginning in Missouri, October, 1935, when petition for suit in equity, charging *Fraud* was filed. Your petitioner charged on page three of foregoing, last paragraph, the Federal judiciary, as a result, received with *"Wide Open Arms"* what was publicly charged in Missouri as *Insurance Corruption* contaminating Missouri courts before Missouri courts gave the answer by court decision, *Missouri State Established Law*. Thusly was why your petitioner was transferred by this defendant from Missouri State to Federal court for trial. There is no need to submit proof a Federal judiciary three-judge Federal court in Missouri, deceived, of course, harbored *Corrupt And Dishonest Insurance* and favored the same by the rendered decision under which thousands of Missouri policy holders were *DEFRAUDED out of from ten to twelve*

millions of dollars of policy holders money. Missouri courts had protected them, the Federal judiciary of Missouri failed to do so. All this since 1935 from the press, not only of Missouri but of the nation which seems proof. As recent as February 10th, 1941, a Missouri court of Jackson County, Missouri, has rendered decision an association identified as the Employers Liability Association (initiated by insurance and this defendant's department head of Kansas City a charter subscriber to said association) had so influenced the citizens of Jackson County Missouri a citizen could not obtain a fair jury trial in Jackson County Missouri courts and, by court decision, decreed change of venue could be had so trial could occur in some other county. Under said Missouri court decision the *CORRUPT GROUP* back of the initiation of said association have been busy endeavoring to influence the Supreme Court of Missouri to over-rule the Jackson County Missouri Court's decision. There is only one way *CORRUPT and DISHONEST INSURANCE EXPLOITING THE PUBLIC CAN BE STOPPED, THE LAW, and this defendant in the above entitled cause your petitioner has, and here again charges to be CORRUPT.* The Jackson County Missouri Court decision rendered February 10th, 1941, was mentioned in petitioner's motion for rehearing, pages 14 and 15, filed April 17th, 1941. Also set out in advance form (and before any official support) on pages ≠ 49-50 petition for writ of certiorari, NUMBER 587, filed NOVEMBER 9th, 1941.

In 1935-1936 it is clear this defendant hoped to stage a Federal judiciary "old-time" Missouri circus with its old Missouri antiquated legal imbroglios finally thrown out of Missouri courts with the adoption of *Missouri State Established LAW.* After repeatedly trying to convince Missouri courts to "junk" Missouri method to protect insurance policy holders, *FAILED*, this defendant transfers

your petitioner in 1935-1936 from Missouri State to Federal court with its retinue of expert and high-priced legal talent, its whole paraphernalia of legal briefs, to convince courts and juries what the Constitution does not intend where it can, and so far has succeeded before the Federal judiciary of Missouri, having utterly failed in years of effort in Missouri and before Missouri Courts.

This is the influence unquestionably back of a group of senators (Republicans and some Democrats) who, in 1937 defeated the President's Federal Judiciary Court Revision Bill. The outraged class in the State (Missouri for one) finally trimmed their sails so they took on the Federal judiciary for the insurance policy holders *JUSTICE*. Two professional lifetime politicians, directors on this defendant's board, paraded the country against the court bill, one a Republican, one a Democrat with life-time diametrically opposite political philosophies. *It takes power to deliver such for public propaganda.*

Today the leadership in this United States Senate group against the court bill back in 1937, comprise the leadership of Senate isolationists justifying Secretary Knox of the Navy to declare to the American Legion convention, on the issue of who fired the first shot—"The important fact for the American people to digest was—*The America First Committee was telling the American public that, in its judgment, more likely the German U-boat commander was telling the TRUTH than the American Naval Officer who commanded the Greer*". This same Senate group of leadership won on the 1937 court bill and this defendant went all the way to *SUPPORT THEM*. Page #47, first paragraph, petition for writ of certiorari, Number 587.) If LAW fails American Democracy would be destroyed from within. Commencing with 1939 America developed a group who would rather defeat Roosevelt than defeat Hitler and the 1937 group of senators lead in 1939, too.

2c

IN THE ORDER NAMED ON PAGE ONE THIS BRIEF, PARAGRAPH 3.

Federal court decision, November 23rd, 1936:

> Federal court entered injunctions, court's final decree ordering Marshall to destroy defendant policy Number 8 611 895, stopping proceedings in Missouri State court.
>
> Circuit Court of Appeals decision affirming Federal court judgment.

This defendant has claimed, throughout the entire Transcript of Record, petitions, Opposition Briefs, Briefs in argument, and at all times and all places that at "any time" did the defendant advise your petitioner what the terms of policy Number 8 611 895 set out, nor was defendant ever so requested by petitioner, anyone representing petitioner; and, of course, if so requested would have refused to answer. This is the claim made by this defendant through the entire life of your petitioner's suit in Equity charging FRAUD.

Federal court decision rendered November 23d, 1936, quote in excerpt:

> "Now, having thus declared the law, I decide an issue of fact, which may be described in the record as the court's finding of Fact No. 1. *I find the fact to be that the defendant did not in any manner or by any means conceal from the plaintiff that the $50,000.00* contract or policy of insurance did contain a provision for indemnity against total and permanent disability; on the contrary, the defendant advised the plaintiff that it contained such a provision."

Policy No. 8 611 895 was evidence before Federal court; and Federal court also admitted to evidence as component part of policy New York Life letter signed, written and addressed to petitioner dated January 9th, 1924, received by petitioner and answered January 12th, 1924, reply addressed

to sender, the New York Life Branch Office, Kansas City, Missouri.

This defendant letter to petitioner dated January 9th, 1924 (as set out in petition for writ of certiorari, Number 587, page #23, last paragraph, continued through pages 24-25), advised petitioner policy No. 8 611 895 had been issued, effective *January 2nd, 1924, terms LIFE & ACCIDENT*, double indemnity, premium $2182.00 for 12 months—1924, urging petitioner to buy policy.

The *terms* of policy No. 8 611 895 proved to be terms of *LIFE, HEALTH and ACCIDENT* as was *proven* by *policy* in *evidence* before *Federal court*, also *defendant letter with contrary advice dated January 9th, 1924. EVIDENCE BEFORE FEDERAL COURT WITH POLICY No. 8 611 895* advised *policy terms LIFE & ACCIDENT.*

Your petitioner initiated petition for suit in Equity charging defendant FRAUD, June, 1934, because defendant on June 29th, 1934, advised petitioner terms of policy No. 8 611 895 only to be *LIFE and ACCIDENT, that policy provided no HEALTH* provision. Hence defendant June, 1934, advice to petitioner conformed to defendant letter to petitioner dated January 9th, 1924, evidence with policy before Federal court.

Defendant denied any June, 1934, contact with petitioner in testifying before Federal court, in Transcript of Record in above cause, in all defendant petitions, briefs, etc.

Petitioner and his secretary was only one advising Federal court these facts, defendant denied same.

Federal Court decision above quoted in excerpt in error—*"ON THE CONTRARY, THE DEFENDANT ADVISED THE PLAINTIFF THAT IT CONTAINED SUCH A PROVISION"*.

This defendant *denied before Federal court, denied in Transcript of Record, denied in all petitions and briefs* to

have ever *advised your petitioner as to terms of policy Number 8 611 895.*

However, *disability of petitioner* was not the issue here, but as the Federal court's same decision *rules of the policy disability clause was NOT AMBIGUOUS,* said Federal court decision has *submerged the issue set out in petition in suit in Equity, FRAUD, and the same Federal court decision ruled it would not pass on FRAUD.* Yet Federal court decision rules *NO FRAUD was committed* by defendant, quote further below from Federal court decision, in excerpt: Quote

> "In view of the finding of fact just made, it is now proper to state a second conclusion of law, which is now stated as the Court's Conclusion of LAW, number 2. Under the facts and circumstances of this case, as shown in the evidence in this case, the defendant did not by any *FRAUD* on its part induce the plaintiff to consent to the surrender of the $50,000 policy or to the substitution therefor of the $25,000 policy".

As evidence before Federal court was defendant New York Life letter to petitioner dated July 25th, 1934, signed L. C. Shellhorn, Cashier, by M. M. McKenny. Quoted in full in petition for writ of certiorari, Number 587, last paragraph page #68 and continued through on page #69. Also mentioned Transcript of Record.

Mr. M. M. McKenny testified before Federal court that he did not know petitioner, had never met him, never talked to him until calling on petitioner at his office about July 24th, 1934, then returned to his own office and wrote petitioner his signed letter dated July 25th, 1934 (quoted in full in writ of certiorari), in confirmation of petitioner's request of office discussion. That petitioner never mentioned his operation, never mentioned his disability to him, Mr. McKenny, nor did Mr. McKenny mention anything to petitioner except as set out in letter of confirmation, Mr. Mc-

Kenny never calling on petitioner at his office after this date, July 25th, 1934.

Your petitioner had testified before Federal court to the same facts previous to Mr. McKenny testifying.

It is plain Mr. M. M. McKenny did not commit FRAUD on your petitioner as charged in petition for suit in Equity, FRAUD.

On July 25th, 1934, petitioner was only interested in surrendering $75,000.00 of defendant insurance all in full force with premiums paid in advance in four different defendant policies. Three of defendant policies were later surrendered for cash values by petitioner on the basis of advice given petitioner by defendant letter to petitioner dated July 25th, 1934, signed L. C. Shellhorn, Cashier, by M. M. McKenny. At the same time defendant reduced policy Number 8 611 895 from $50,000.00 to $25,000.00 and on the same defendant authority, defendant letter to petitioner dated July 25th, 1934. Petitioner, however, never did to date receive the cash surrender values in cash as set out in defendant letter to petitioner dated July 25th, 1934. What part of cash petitioner did receive from defendant petitioner was forced to hand back to defendant to pay premium on the $25,000 of insurance still remaining in policy No. 8,611,895.

Transcript of Record mentions defendant letter to petitioner dated August 10th, 1934, signed L. C. Shellhorn, Cashier, by M. M. McKenny, quoted in full in petition for writ of certiorari, No. 587, page 70-71 and also evidence before federal court trial. Also mentioned in Transcript of Record and also evidence before federal court trial was petitioner's letter to defendant Home Office dated August 11th, 1934, as quoted in full in petition for writ of certiorari, No. 587, page 72-73-74.

Mr. McKenny requested petitioner to write said letter to defendant Home Office dated August 11th, 1934, in place

of writing it by the defendant Kansas City Branch Office on the ground defendant Kansas City office made the error, it would be embarrassing to write Home Office and suggested petitioner so write Home Office. Mr. McKenny read petitioner's manifold copy of petitioner's letter to defendant Home Office dated August 11th, 1934, nor did Mr. McKenny deny having so read said petitioner's August 11th, 1934, to defendant Home Office in testifying before federal court.

On Mr. McKenny's interrogation on federal court witness stand as to whether he, McKenny, did read manifold carbon of petitioner's August 11th, 1934, letter to defendant Home Office Mr. McKenny remained silent beyond the reasonable time the Honored Federal Judge thought necessary and the federal court requested Mr. McKenny to make answer to question, McKenny then testifying "I do not remember". Petitioner has always believed had McKenny not been hurried thusly on witness stand McKenny might have testified differently, perhaps remembered. Mr. McKenny testified in federal ocurt that he, McKenny, was requested to call on petitioner at petitioner's office about July 25th, 1934, by Cashier Shellhorn or his assistant, Mr. Wells.

It is unusual a defendant of this colossal size in money and influence with its Cashier Shellhorn and his assistant, Mr. Wells both at defendant office and both available, would send their Mr. McKenny to call on petitioner at his office (a one hundred thousand dollar defendant policy holder in greater Kansas City), with McKenny not knowing petitioner, never having been in petitioner's office before about July 25th, 1934, and was forced to identify himself, Mr. McKenny, to petitioner to discuss petitioner surrendering $75,000.00 of defendant insurance, the $50,000.00 policy reduced to $25,000.00 through such McKenny office contact in force since year 1924, and the entire $100,000 of defendant

insurance in full force for years, and all in full force during July, 1934, and into August, 1934, particularly so as this defendant used petitioner as their advertisement to sell their wares in greater Kansas City. It is, of course, possible Mr. Wells, Cashier Shellhorn's assistant was in your petitioner's office in June, 1934, and sent to petitioner's office in June, 1934, by Cashier Shellhorn on petitioner's request to discuss terms of defendant policy No. 8,611,895, as well as terms in other three defendant policies.

If a federal court is to be permitted by Law to receive from a Missouri state Court petitioner's petition in suit in Equity charging Fraud against this defendant, year 1934, said Equity Suit filed in Missouri state Court, October, 1935, try said Equity Suit on Fraud in Federal Court without jury, deny petitioner the Right to prove Fraud, turn federal Court decision out of the federal judiciary mill wrapped up on an issue of permanent and total disability, ruling by both decision and written federal court opinion the disability clause in defendant policy was not *ambiguous*, then for the same federal court to later enter federal court temporary injunction staying proceedings in Missouri State Court (refiled by petitioner December, 1937, on second attempt for Justice) so Law would permit first a "Fair" trial on defendant Fraud—then let court rendered decision be what it may—the "administration of Justice" within the federal judiciary is not what it is claimed to be.

Federal Court decision, quoted in excerpt, ruled:

> "If the decision on that issue of fact which was decided in finding of fact No. 1 *had been otherwise*, and if the law as set out in conclusion of law No. 1 *had been otherwise*, and if, therefore, it had been decided that the plaintiff *was entitled to a reinstatement of the* $50,000 *policy, then it would have been necessary to have determined whether he was permanently and totally disabled as alleged in his bill, and whether, also,*

he had made proper proofs as required by the policy. Now, I do not intend to pass upon the issue of fact As To Whether The Plaintiff Mailed The Letters Described In Evidence As Exhibits 3 and 4, And Whether The Defendant Received Those Letters". End quote in excerpt.

The two letters, Exhibits 3 and 4 referred to in above decision are identified by date written in Transcript of Record in this case. One, written by petitioner and mailed June 29th, 1934, addressed to Home Office of this defendant appears in full on page 67, petition for writ of certiorari, No. 587.

The Veterans Administration requested your petitioner to immediately write this defendant Home Office this letter on June 26th, 1934, in fact Veterans Administration wrote your petitioner confirming their said verbal request on petitioner June 28, 1934, your petitioner writing this defendant Home Office June 29th, 1934, mailing letter by first stamping letter, nor was this letter ever returned to petitioner as petitioner testified in federal court. Veterans Administration records hold proof clearly indicating this defendant Home Office received petitioner's letter dated June 29th, 1934, and also this defendant Home Office undertook to withhold from Veterans Administration defendant 1932 medical examination made on petitioner as mentioned in petitioner's letter dated June 29th, 1934, to this Home Office specifically. (*Page* 25 *writ of certiorari*)

Your petitioner testified to foregoing facts in federal court trial, and Veterans Administration testified also with records before them and corroborated petitioner's testimony.

The other letter written by petitioner to this defendant Home Office, also an exhibit before federal court and as mentioned in decision, also mentioned in Transcript of Record, was petitioner's letter to this defendant Home

Office dated August 11th, 1934, and quoted in full on page #72 of petition for writ of certiorari, No. 587.

The foregoing brief in argument, page #14-15-16 refers to defendant official at Kansas City Office (Mr. M. M. McKenny) who requested your petitioner to write their Home Office on August 11th, 1934, and later read petitioner's manifold carbon copy of letter petitioner wrote, signed and mailed to this defendant Home Office dated August 11th, 1934, nor was letter ever returned by Post Office to petitioner. See page # 28 to #33, petition for writ of certiorari, No. 587 for full details on defendant official, M. M. McKenny, relationship with your petitioner. No insurance corporation is going to send to its $100,000.00 policy holder office who for years the insurance office had a personal relationship one of their officials a total stranger to policy holder, never in policy holder's office previously, did not make the office call on policy holder's request. Why should this defendant with your petitioner knowing personally the Kansas City Branch Office Cashier (L. C. Shellhorn) also his assistant (Mr. Wells) with both Shellhorn and Wells at this defendant Kansas City Branch Office when their Mr. M. M. McKenny (unknown to petitioner) walked into petitioner's office about July 24th, 1934, and commenced to discuss with petitioner cashing in $75,000.00 of his $100,000.00 insurance to receive cash value money not a day later than August 10th, 1934, if by the end of July, 1934, petitioner did cash in $75,000.00 of his $100,000.00 insurance. It is glaringly inconsistent on the face of it all.

Ever since Federal court rendered its decision November 23rd, 1936, your petitioner, under the Constitution of the United States, and under all LAWS ever declared to be the LAW by this Honorable Supreme Court of the United States, your petitioner always had the *RIGHT* to go back into his *own State Court of Missouri for JUSTICE* if the Federal court (even though the Circuit Court of Ap-

peals, Eighth Circuit, did uphold the Federal court on appeal Federal court injunction) had failed to render *JUSTICE* on a *suit in equity charging FRAUD first filed in a Missouri State Court but tried by Federal court because this defendant desired a Federal court (Not a Missouri State Court) to try the case and render so-called JUSTICE.*

On Page #76, petition for writ of certiorari, No. 587, appears:

> *Statement of Basis on Which the Jurisdiction of this, The Supreme Court of the United States is invoked.*
>
> The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938 (28 U. S. C. A. 347 a), and under same Act, Chapter 229, Section 8,43, Stat. 940 (28 U. S. C. A. 350).
>
> *Specification of Errors Intended to Urge.*
>
> 1) The Circuit Court of Appeals Eighth Circuit erred in affirming judgment of the District Court in favor of respondent.
>
> 2) The Circuit Court of Appeals Eighth Circuit erred in not holding that by reason of the prohibition contained in Section 379, U. S. C. A., Title 28, Section 365, Judicial Code, A FEDERAL COURT MAY NOT STAY PROCEEDINGS *IN PERSONAM* pending in a state court.
>
> 3) The Circuit Court of Appeals Eighth Circuit erred in not holding that after a COURT IN EQUITY has decided the *EQUITABLE ISSUES ADVERSELY TO THE PETITIONER*, such *COURT HAS LOST JURISDICTION TO TRY AND DETERMINE LEGAL ISSUES.*

The Federal court never had a legal *RIGHT* to enter Federal court temporary injunction and thus stop proceedings in a Missouri State Court on an action IN PERSONAM.

The Circuit Court of Appeals, Eighth Circuit, never had a legal right, on appeal, to affirm Federal court's judgment.

While the Federal court rendered decision rules there was no defendant FRAUD, the same rendered decision plainly states the Federal court did not pass on the issue of FRAUD set out in petitioner's suit in equity charging FRAUD for year 1934, and the Federal court decision rules—"Now I do not intend to pass upon the issue of fact as to whether the plaintiff mailed the letters described in evidence as Exhibits 3 and 4, and whether the defendant received those letters, etc.".

When your petitioner decided to enter petition for suit in equity charging FRAUD in year 1934 before a Missouri State Court (jury trial compulsory in Missouri), and so filed petition in said suit in equity charging FRAUD year 1934 in Missouri State Court, October, 1935, petitioner was legally forced to prosecute his equity suit FRAUD charge from the start of petitioner's first discovery of defendant FRAUD which was when defendant official, Mr. M. M. McKenny walked into petitioner's office on or about July 24th, 1934, unknown to petitioner.

What put Mr. M. M. McKenny in petitioner's office (and not on request of petitioner) stepped back to petitioner being in Veterans Administration's office June 28th, 1934, Veterans Administration requesting petitioner to sign their affidavit on June 28th, 1934, for Retired Officers Emergency List which your petitioner could not sign, and did not sign June 28th, 1934, due to lack of records and dates, etc.

On June 28th, 1934, also the Veterans Administration requested petitioner to sign still another one of their affidavits, for government insurance benefits. As petitioner did not sign this Veterans Administration's second affidavit, and also for lack of knowledge, etc., on definite data, it so happens petitioner did not definitely know if his defendant $100,000.00 insurance then in full force and effect

provided terms of *LIFE, HEALTH and Accident*, or only *LIFE and ACCIDENT*, and the Veterans Administration demanded to know true facts, in fact offering themselves to petitioner as willing to look over all his insurance policies, both in force and not in force, to advise him the correct coverage or policy terms. The defendant letter to petitioner dated January 9th, 1924 (as mentioned in foregoing brief in argument, page 18 also starting with page #18, paragraph three, continuing through to pages 23-24-25), advised your petitioner terms of policy No. 8 611 895 to be *LIFE and ACCIDENT*. Since receipt of defendant letter dated January 9th, 1934, the foregoing request on petitioner and by Veterans Administration on June 28th, 1934, was the first occasion petitioner had where he was forced to state, and by sworn affidavit, if his defendant $100,000.00 insurance was *LIFE, HEALTH and ACCIDENT, or LIFE and ACCIDENT or STRAIGHT LIFE.* Petitioner, in the course of his normal life, had purchased a countless number of insurance policies and from a countless number of insurance companies, one of which was this defendant. All were required to be shown on Veterans Administration affidavit (whether in force or not in force) so if petitioner erred in insurance policies *NOT IN FORCE* in a signed affidavit with Veterans Administration it would not have mattered a great deal, but with this defendant insurance policies (four all told) all in full force and effect June 28th, 1934, falsifying a Veterans Administration's affidavit appeared a serious matter to petitioner. It can be stated here by your petitioner he went over all insurance policies ever purchased by him from his first insurance policy in 1905, among which was this defendant's four policies, and while signing Veterans Administration affidavits (two different forms) Veterans Administration requested petitioner to sign June 28th, 1934, your petitioner did sign these two Veterans Administration's affidavits,

but not on June 28th, 1934, nor on June 29th, 1934, but later, and when so signed, one of said Veterans Administration's affidavits governing government insurance benefits states thereon, and over petitioner's signature, this defendant four policy insurance coverage provided only *LIFE and ACCIDENT* terms.

On morning of June 29th, 1934, your petitioner had a personal discussion with defendant Cashier, L. C. Shellhorn, in charge of defendant Kansas City Branch Office, requesting Cashier Shellhorn to send his policy expert down to petitioner's office that morning (June 29th, 1934) obtain from petitioner the four defendant policies and analyze said policies as to terms. Accordingly defendant Cashier Shellhorn sent to petitioner's office his assistant, Mr. Wells, who entered petitioner's office, said he had been sent by Cashier Shellhorn and what for, and petitioner's secretary obtained from the cabinet the four defendant policies, handed same to defendant Mr. Wells who then left your defendant's office, advising he would return later in the day, June 28th, 1934, and return policies. Defendant Mr. Wells never since entered petitioner's office; but Cashier L. C. Shellhorn, on the afternoon of June 29th, 1934, advised your petitioner his four defendant policies did not contain a HEALTH provision, but did provide a LIFE and ACCIDENT coverage, and accordingly your petitioner's signed Veterans Administration signed affidavit states this defendant insurance to be terms of *LIFE and ACCIDENT*.

The terms of defendant policy turned out to be *LIFE, HEALTH and ACCIDENT*, and with a *DISABILITY POLICY CLAUSE* in defendant policy No. 8 611 895 identically the same as appearing in this same defendant policy before Court of Appeals, Missouri, when this court rendered decision May 8th, 1934, in *Rickey* v. *New York Life Insurance Corporation*, No. 22787, S. W. Reporter, 2d series, #71, page #88, as set out in foregoing brief in

argument, page SIX, and likewise as set out more fully in your petitioner's motion for rehearing granted by this Court April 17th, 1941, page FOUR.

Your petitioner had no suspicion this defendant Cashier, L. C. Shellhorn, and his assistant, Mr. Wells, would deny their personal contact with petitioner (also with secretary in the case of Wells) June 29th, 1934, until they both testified in Federal court. Proof will be given below to show your petitioner was justified these two individuals, defendant officers, would testify in Federal court to the true facts as they know them.

In petitioner's joint discussion with Cashier Shellhorn *and Mr. McKenny on September 11th, 1935* (when petitioner first discovered defendant FRAUD), Cashier L. C. Shellhorn admitted to petitioner in his defendant office that he, Shellhorn, about *June, 1934, was requested by petitioner to send policy expert to petitioner's office, and that he, Shellhorn, did send his Mr. Wells to petitioner's office*, but explained to petitioner Mr. Wells was incompetent to analyze a defendant policy, not having an expert policy analyst to send to petitioner's office morning of June 29th, 1934, and petitioner was in a hurry for a policy analysis. Wells was incompetent, regretted, etc.

Your petitioner testified to above facts in Federal court, his secretary so testified, Veterans Administration testified in corroboration, and against this preponderance of witness testimony, by petitioner, confirmed by Federal court decision relating to Exhibits 3 and 4 (petitioner's June 29th, 1934, and August 11th, 1934, letters to defendant *HOME OFFICE*), the Federal court decision ruled no defendant FRAUD. The same Federal court decision rules the court would not pass on issue of *FRAUD*.

Against the preponderance of petitioner's Federal court testimony and evidence, one lone individual (a defendant official) testified in Federal court "that he, Wells, did not

call upon petitioner in his office June 29th, 1934, that he, Wells, was not sent to this office by Cashier Shellhorn, that he, Wells, was never in petitioner's office in his life, etc.".

The Federal court decision, quoted in excerpt ruled:

> "In connection with this declaration of law, and as a corollary thereto, the court further declares the law to be; that under the facts and circumstances of this case, an insured to whom a policy of insurance has been delivered, who has that policy in his possession, *if there is nothing in the application for the policy that is inconsistent with the terms of the policy, is CONCLUSIVELY PRESUMED TO KNOW THE PROVISIONS OF THE POLICY*, and that under the facts and circumstances of this case, this plaintiff was conclusively presumed to know that the $50,000 policy did contain a provision entitling the insured under certain conditions therein stated to the indemnity mentioned of $500.00 per month upon receipt of due proof that the insured was totally and permanently disabled."

The excerpt of Federal court's decision quoted on page seventeen foregoing brief in argument concludes "*NOW, I DO NOT INTEND TO PASS UPON THE ISSUE OF FACT AS TO WHETHER THE PLAINTIFF MAILED THE LETTER DESCRIBED IN EVIDENCE AS EXHIBITS 3 and 4, AND WHETHER THE DEFENDANT RECEIVED THOSE LETTERS*".

Petition of writ in certiorari, Number 587, page #23-24-25-26-27-28-29, on irregularities, discrepancies, FRAUD all proved to exist on photostatic copy of medical examination against which policy No. 8 611 895 was issued by defendant when compared to policy, documentary evidence before Federal court this was wrong, and yet more, in answer to Federal court's above quoted decision where decision states "*if there is nothing in the application for the policy that is inconsistent with the terms of the policy*". Tersely here signed application specifies policy to be issued was *Ordinary*

Life, 2) policy issued was *LIFE, HEALTH* and *ACCIDENT*, 3) defendant letter January 9th, 1924, states policy terms *LIFE and ACCIDENT*, in force and effect January 2nd, 1924; 3) Home Office by pen and ink notation last page policy put policy in force June 4th, 1924, front page of policy states went into force and effect January 2nd, 1924, and HOME OFFICE, nor anyone or any defendant office advised petitioner said change; had been made in policy as to terms against signed application, when policy in force and change as to date in force made by *HOME OFFICE*, and 4) this defendant issued policy No. 8 611 895 and put policy (*AT HOME OFFICE*) into force and effect June 4th, 1924, on medical examination made *November 30th, 1923, glaringly* against its own *Rules and Regulations*, Rules and Regulations undoubtedly followed by all Insurance Underwriters and also undoubtedly by LAW itself, and kept all knowledge of all this religiously from petitioner, in fact safeguarded petitioner from discovering this defendant FRAUD back in 1923-1924 by volunteering to act as petitioner's *INSURANCE ADVISOR* on all individual insurance coverage for self and family to the end no competitive insurance might ever obtain possession of defendant policies to analyze said policies for petitioner, and 5) This was evidence before Federal court both at trial, but on motion for rehearing with affidavit support which Federal court denied, affidavit setout petitioner's Federal court subpoenaed witness interferred with by this defendant during session of trial, defendant requesting witness not to testify at trial as to his knowledge—this witness requested your petitioner to let him have defendant policies first in September, 1933, to analyze policies to see if contained disability clause and was refused by petitioner and advised petitioner would depend upon defendant for any such advice; and within one hour after defendant official Wells left petitioner's office with defendant policies morning of June 29th, 1934, this

same Federal court subpoenaed witness thus interfered with by defendant at trial, entered petitioner's office and again requested defendant policies to analyze and see if contained disability clause, but witness was advised by petitioner defendant Wells had just left your petitioner's office with defendant policies to analyze for the same thing.

In the face of this documentary evidence setout before Federal court during trial the above quoted rendered decision was in error; and it also was a Federal court error in denying motion for rehearing with said affidavit support—as set out pages 14-15-16 petition for writ of certiorari, No. 587.

On your petitioner's permanent and total disability (against Federal court's legal *RIGHT* under Supreme Court of the United States LAW on petition for suit in equity charging FRAUD) Federal court decision found, quoted in excerpt:

> "He certainly is totally disabled, I would think, from carrying on the same kind of business enterprise as that upon which he was engaged and at which he was very successful. He cannot do that, nor anything of that character, etc.".

Petition for writ in certiorari, No. 587, starting with last paragraph page #42, continuing through to page #46—also pages #20-#21, gives full particulars a Federal court issued and served subpoena on hospital to produce hospital report on petitioner as evidence before Federal court trial was ignored by hospital, official hospital report not so produced as evidence before Federal court trial. Last paragraph page #42 writ of certiorari, Number 587, states Veterans Administration hold proof petitioner suffered relapse—stomach hemorrhage—on December 6th, 1936, three days following Federal court denying motion for rehearing.

Your petitioner put no evidence before Federal court trial that petitioner could not do work other than his regular business endeavor for twenty years before his disability as it was unnecessary. In proving disability for regular line of work evidence went before Federal court, petitioner's physical condition not permitting petitioner to do his regular line of work, carrying on office work in connection therewith met with failure, severe stomach hemorrhage and confined to bed for months. This defendant subpoenaed witnesses, however, at trial; and by petitioner's own associates, proved it all to Federal court for petitioner which was contrary to what this defendant hoped for, but defendant did succeed in obtaining a Federal court decision in disagreement with Missouri's State Established Law on disability, but not on evidence before trial to justify any such decision. The Federal court sincerely did not believe, in petitioner's conviction, defendant policy disability clause was *AMBIGUOUS*. However, as all Missouri Court Judges did believe, and still do believe disability clause in defendant policy No. 8 611 895 to be *AMBIGUOUS*, the issue here is Federal court entering temporary, permanent injunctions, court's final decree (Marshall to destroy defendant policy No. 8 611 895, the LAW) all on appeal before this Honorable Supreme Court of the United States.

The Federal court never had a legal RIGHT to stop proceedings in a Missouri State Court in an action IN PERSONAM, as under the Constitution of the United States, any and all Laws ever declared to be LAW by this Honored High Court, Missouri State Court Judges have a RIGHT legally to try your petitioner's above entitled cause against this defendant.

When the Federal court ruled by decision, and adversely to petitioner on suit in equity before Federal court charging FRAUD, such Federal court *LOST JURISDICTION to try and determine LEGAL ISSUES (DISABILITY UNDER*

POLICY CLAUSE IN DEFENDANT POLICY), as fully setout in petition for writ of certiorari, Number 587.

This defendant in its opposition brief entered just previous to the Supreme Court of the United States order entered April 7th, 1941, on equally divided court, rehearing granted petitioner April 17th, 1941, attempted to support Federal court RIGHT to stay proceedings by injunction in Missouri State Court on appeal in above cause, claiming the right of injunction went back to the time of King Henry Eighth and Cardinal Wolsey.

In the Supreme Court of the United States decision rendered April 25th, 1938, *Erie Railroad Company v. Tomkins*, No. 367, U. S. Rep. Vol. 304, October Term, 1937, page #64, decision delivered by Mr. Justice Brandies—decision by Mr. Justice Holmes appears, as follows—quote:

> "The fallacy underlying the rule declared in Swift *v.* Tyson is made clear by Mr. Justice Holmes—23. The doctrine rests upon the assumption that there is 'a transcendental body of law outside of any particular state, but obligatory within it unless and until changed by statute', that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts 'the parties are entitled to an independent judgment on matters of general law', but law in the sense of which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that state existing by the authority of that state without regard to it may have been in *ENGLAND* or anywhere else * * * 'the authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its legislature or of its Supreme Court) should utter the last word'. * * * Thus the doctrine of Swift *v.* Tyson is, as Mr. Justice Holmes said, 'an unconstitutional assumption of powers by Courts of the United States which no lapse of time or

respectable array of opinion should make us hesitate to correct.' "

In petition for writ of certiorari, Number 587, is to be found quoted in full on page #83 written opinion by Federal court when entering Federal court temporary injunction stopping proceedings in Missouri State Court contrary to well setout, likewise in writ, United States Supreme Court LAWS: It seems unnecessary to quote therefrom except the following excerpt here—quote

"Had there been an appeal the Circuit Court of Appeals would have heard the case *de novo*. It might well have disagreed with our finding of fact No. 1 (Petition for suit in equity, FRAUD) and nevertheless affirmed the degree because of finding of fact No. 2 Disagreement with Missouri State Established Law on disability). Certainly the decision of an issue which might be the sole basis for affirmance of a degree is a decision arising to the dignity of res adjudicata".

Your petitioner believes, together with foregoing comment in this brief in argument, and with direct reference to clause #1, page #1 of brief—*WHY DID THE STATE OF MISSOURI ADOPT MISSOURI STATE ESTABLISHED LAW LEGALLY INTERPRETING THE INSURANCE POLICY DISABILITY CLAUSE*—and also to what petitioner points to in last paragraph page #3 foregoing brief in argument, this written opinion by Federal court is a plain admission, and by the Federal court itself, the issue of FRAUD as setout in petition for suit in equity charging defendant *FRAUD* before this Federal court to determine (FRAUD) was giving scant consideration by Federal court (and FRAUD not determined even though decision rendered November 23rd, 1936, rules NO FRAUD) which equity issue of FRAUD was entirely superseded by the injecting in same decision (and contrary to United States Supreme Court LAW) ruling on disability

clause of policy, declaring your petitioner while "disabled for his regular line of work" still could do some other kind of work and thus disagreed by Federal court decision with the controling LAW of Missouri on the insurance policy *AMBIGUOUS* disability clause. Here in this written opinion Federal court admits higher court "might well have disagreed with our finding of fact No. 1 (Fraud) but affirmed the decree because of finding of fact No. 2 (Disability).

Your petitioner will now quote directly below still another written opinion by Federal court when denying motion for rehearing December 3rd, 1936, with affidavit support showing defendant interference with petitioner's Federal court subpoenaed witness during session of trial with knowledge on FRAUD, thus denying petitioner the legal *RIGHT* to prove FRAUD.

With the controlling Missouri State Court decisions (Missouri State Established Law) having already driven this defendant out of the State of Missouri with form policy No. 8 611 895 and its AMBIGUOUS disability clause in your petitioner's above entitled cause supporting Federal court in the rendered decision November 23rd, 1936;—*ON THE BOTTOM*—and with the United States Supreme Court decision (*Mutual Life Insurance Company of New York* v. *Johnson*, 293 U. S. 335, 340, opinion written by Mr. Justice Cardozo December 3rd, 1934) supporting this Federal court's legal action (denied motion for rehearing) so that FRAUD charged in petition for suit in equity could be proven,—*SUPPORTING THE FEDERAL COURT FROM THE TOP*—in the face of bottom and top support such as stated, on December 3rd, 1936, Federal court entered following written opinion giving Federal court's legal interpretation of disability clause in policy No. 8 611 895 in above cause—quote

> "In support for the motion for rehearing plaintiff's learned counsel has submitted an exhaustive and most

scholarly brief. We have studied this brief as it deserves to be studied. It is not necessary, however, to consider more than one point urged in the brief and upon oral argument by the author of the brief.

By the contract in this case plaintiff was insured against becoming so permanently and totally disabled as that he could be prevented thereby from engaging "in any occupation whatsoever for remuneration or profit." We found, on the issue of facts, that the plaintiff was not so totally and permanently disabled as to be prevented from engaging in "any" occupation. Our precise language in this finding of fact was as follows:

"This contract says that to be totally disabled he must be unable to engage in any occupation whatsoever for remuneration or profit. Now that means any one of a thousand occupations. I have not the slightest doubt but that the defendant has the ability, for example, to carry on the occupation of clerk of this court, or the deputy clerk who sits here in this chair, or work of any similar character. I believe that it has not been proven that the plaintiff, within the meaning of this contract, is not now nor never has been at the time alleged in the petition wholly disabled by bodily injury or decease, so that he is prevented thereby from engaging in any occupation whatsoever for remuneration or profit, and I think the fact to be that he is not and has not been so disabled".

"It is now contended by learned counsel for plaintiff that under the Missouri decisions the contract provision here quoted must be overruled as if it insured the plaintiff against becoming totally disabled from engaging *in his usual occupation.*

When the case was tried we believed the law to be that a federal court would use its own judgment in construing the provisions of the insurance contract. Our attention was not then called to the opinion of Mr. Justice Cardozo in *Mutual Life Insurance Company* v. *Johnson*, 293 U. S. 335, and we did not then give consideration to that opinion. It cannot be doubted that

the Supreme Court did rule in that case, as the opinion shows, that the federal courts should adopt the state courts' construction of the insurance contract provision which is *ambiguous* in its meaning. It is said in the opinion that where, as in the case then under consideration, the matter for decision—

"is the meaning, the tacit implication, of a particular set of words, which, as experience has shown, may hold a different answer to this reader and to that one as we accept as our guide the law declared by the state where the contract had its beginning."

"We think the law declared in the *Mutual Life Insurance Company* v. *Johnson* (which, of course, we are duly bound to follow, if it is applicable) does not apply here. The language of the contract here is not ambiguous. It is not such as yields "a different answer to this reader and to that one" although conceivably one reader may *say* that it has a meaning which the language does not *yield*. To say that the words "any occupation whatsoever" mean the "usual occupation of the insured" is to give to those words, as we somewhat intemperately remarked at the oral argument, not a "liberal" interpretation, but an utterly "*wild*" and wholly unjustified interpretation. Nor are we able to accept as sound the argument made in this connection (it is even suggested parenthetically by Mr. Justice Cardozo in his opinion) that because some courts may have given a distorted significance to plain words that, therefore, the plain words must be *AMBIGUOUS*. If we have to interpret a sentence reading "*THE CAT IS BLACK*" we would not think it *ambiguous* and of doubtful meaning even if *five hundred* men declared that what really was meant is "*THE CAT IS WHITE*".

Even in those cases in which the federal court is bound to accept the construction of state courts (as the construction Missouri Court of Appeals: *Federal Lead Company* v. *Sawyer* (8 C. C. A.) 161 Fed. 687. It is frankly conceded, however, by learned counsel for the

plaintiff that the only Missouri Courts which have construed the insurance provision involved here as plaintiff contends this one should be construed are the decisions of the courts of appeals of Missouri. In no event are we bound by their decision.

The motion for a rehearing is overruled. IT IS SO ORDERED. To this order plaintiff is allowed an exception."

In thus defending and supporting by LAW the Insurance Corporation contention in above entitled cause, the defendant here, this Federal court states, both by decision (November 23rd, 1936) and written opinion (December 3rd, 1936) the disability clause in defendant policy No. 8 611 895, above cause, it is not *PHRASED AMBIGUOUSLY*, that it means a policy holder having in his possession such defendant policy with said disability clause must first *prove that he lay the full period of his injury in a state of coma* when, perhaps, this Federal court would declare it to be the LAW under the Constitution of the United States this defendant, standing here before this Honorable Supreme Court of the United States today, would be liable. Otherwise not.

The Federal court also *MEANS* to say it is the LAW that the unsuspecting public buying insurance policies with the identical disability clause therein as in policy No. 8 611 895 issued to petitioner by defendant in 1924, defendant collecting thousands of dollars in premiums from petitioner since 1924, can keep all the premiums thus collected; and also all other insurance corporations with still differently phrased policy disability clauses to the same end and for the same purpose as this defendant injected its policy clause in policy No. 8 611 895 governing disability can likewise keep policy holders money, *THE LAW*, this Federal court thus legally interpreting the *LAW* to be, interpreting the legally admitted *AMBIGUOUS* pol-

icy clause by Missouri State courts as *NOT AMBIGUOUS* and under such Federal court legal interpretation, and by decision, this defendant *WINS* if such decision and written opinion by this Federal court stands, supported as it is by the Circuit Court of Appeals, Eighth Circuit, defendant can continue to collect its premiums from policy holders on a policy contract legally said to be, and so declared by Missouri State court decisions, as utterly useless to an insured, and is nothing short, practically speaking, "*of collecting a premium without rendering a consideration*". This is the language of Missouri courts as shown by one of Missouri's 1905 court decisions set out on page FOUR of foregoing brief in argument; also on page FIVE of same said brief in argument, rendered year 1937.

Petitioner also refers to his motion for rehearing granted by this Honored Supreme Court of the United States in above cause April 17th, 1941, page FOUR. Here is shown the *Rickey* v. *New York Life Insurance Corporation*, No. 22787, S. W. Reporter, 2d series, #71, page #88. *Decision rendered May 8th, 1934, Missouri Court of Appeals.* Before this Missouri court was the same defendant policy, with the same *AMBIGUOUS* disability policy clause as is evidence here by your petitioner in above entitled cause against this same defendant. And the Missouri court in 1934 said—first declaring by decision "*plaintiff's evidence must be deemed true, defendant's CONTRADICTORY EVIDENCE MUST BE DISREGARDED*", *and the court then* said—

> "Having in mind the foregoing rules, can it be said that plaintiff, by his extraordinary efforts to make a living for his family and himself, thereby furnishing evidence which, as a matter of LAW, will defeat his claim for disability benefits".

The Missouri court 1934 decision as mentioned in the foregoing paragraph had its origin in year *1921* when this

same defendant, as here, sold a Missouri citizen its policy with the *same disability clause as in policy No. 8 611 895 before the Federal court in rendered decision, November 23rd, 1936, and written opinion December 3rd, 1936, already quoted.* This defendant kept this Missouri policy holder of their's in *court from a start of 1921 until the Missouri Court of Appeals rendered its decision, as quoted, May 8th, 1934.*

In the *Rickey* v. *New York Life Insurance Corporation* case, No. 22787, the policy holder, while not being able to work at his "*regular line of work*" he did work "*at some other kind of work*".

With your petitioner in the above entitled cause, and as testimony and evidence proved before the Federal court trial on petition for suit in equity charging FRAUD 1924, petitioner did not work at "some other kind of work". Petitioner tried to, never received "*any*" "remuneration or profit" and of this the Federal court was well aware. It is plain the Federal court believes it to be the LAW, under disability clause in policy Number 8 611 895 that policy holder must lie in a continuous state of coma during period of disability. The Federal court rendered decision, however, failed to require this defendant State such a provision clearly in its policies together with its atrocious disability clause. The Missouri Supreme Court in its rendered decision quoted on page FIVE of foregoing brief in argument on motion for rehearing granted had before it, cited as a precedent case, the *Rickey* v. *New York Life Corporation* case, Number 22787.

Appeal on Federal court temporary injunction stopping proceedings in Missouri State court on petition for suit in equity charging FRAUD (filed in Missouri State court, October, 1935) was filed with Circuit Court of Appeals, Eighth Circuit, decision rendered February 24th, 1939.

Your petitioner was very greatly interested in respondent's brief in opposition to Supreme Court of the United States taking jurisdiction on petitioner's petition for writ of certiorari, No. 587, filed by petitioner November 9th, 1940. In fact on page Twenty Five in foregoing brief in argument on rehearing motion granted by this Supreme Court mention is therein made of respondent's brief.

In said respondent's brief, page #15 defendant states—

> "The reasoning of the Eighth Circuit on this point is unanswerable. Judge Woodrough said, in 102 F. (2d) at page 20". Then quotes the Honorable Judge.

This same decision rendered by the Circuit Court of Appeals Eighth Circuit said—quote in excerpt:

> "It is well settled 'where a bill states a case entitling the complainant to equitable relief, if the proof fails to establish the averments of the bill in that respect *the court is without jurisdiction to proceed further and determine rights that are cognizable in a court of law*". It is also the rule "that where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill and remit the cause to a court of law. The decision here incorporates therein a number of precedent cases in support".

The Circuit Court of Appeals, Eighth Circuit, however, from their judicial reasoning then said—quote

> "After that final adjudication had been made and decree entered, a law case for recovery of disability benefits has been *ingeniously made* out of the face of a petition in the State court by simply omitting the facts as they were established between the parties in the Federal equity suit. The pleader has omitted to show that Mr. Toucey made application to the insurance company for reduction of his policy and that pursuant

to that application the alteration and reduction of the policy as to premium and benefits was made and that he had recognized the change in the contract by making a payment of premium at the reduced premium rate. *THE HOPE OF THE PLAINTIFF IN THE LAW CASE MANIFESTLY IS TO FRAME THE PLEADINGS SO AS TO ASSERT A CLAIM OF FRAUD AGAINST THE COMPANY IN A SUBSEQUENT PLEADING.*"

The full truth in the petition for suit in equity charging FRAUD and tried before Federal court was stated by petitioner and witnesses, also evidence such as witnesses and evidence subpoeaned by Federal court succeeded in getting before the court. It did get befor the Federal court and by affidavit on motion for rehearing this defendant interfered with petitioner's subpoeaned witness with knowledge on FRAUD. The Federal court in written opinion states it was necessary to only mention one point on denying motion for rehearing (*NOT FRAUD*) but a lengthy explanation as to why the disability clause in policy No. 8 611 895 was *NOT AMBIGUOUS*, why Federal Court did not agree with Missouri State Established Law, as well as why Federal court did not agree with decision rendered by the United States Supreme Court in the *Mutual Life Insurance Company of New York* v. *Johnson*, 293 U. S. 335, 340, decision written by Mr. Justice Cardozo, December 3rd, 1934. What the Federal court really said in written opinion of December 3rd, 1936, (quoted on page #27-28 of foregoing brief in argument granted by Supreme Court on motion for rehearing) was the Supreme Court of the United States decision here did not apply.

Wrapped up in said United States Supreme Court decision thus writen by Mr. Justice Cardozo was a precedent case cited to influence the court's judicial judgment, namely, "*Cf. Klein* v. *New York Life Insurance Company*, 104 U. S.

88, 26 L. Ed. 662'' and as it will be shown in quoting said Supreme Court decision below, this defendant here in above cause appeared before a Federal Court in Virginia, cited as a precedent, where a Virginia Federal Court was influenced to believe the disability clause in defendant's insurance policies was *NOT AMBIGUOUS* and rendered a decision in favor of defendant insurance. However, on appeal of said case in Virginia, the Circuit Court of Appeals Fourth Circuit over-ruled the Virginia Federal Court and the Supreme Court of the United States, decision written by Mr. Justice Cardoza affirmed. Here a policy holder of this defendant in the above cause, becoming insane, was defrauded by this sane defendant in the name of the LAW if *DEFRAUDING BY LAW* is an issue in the above entitled cause, and your petitioner is firmly convinced that it is all a deliberate attempt by this defendant to *DEFRAUD* your petitioner and so far has succeeded, the Federal Court's final decree with injunctions on appeal here having ordered the Marshal to destroy defendant policy No. 8 611 895 with abundant proof of this defendant FRAUD, the Circuit Court of Appeals Eighth Circuit even inferring LAW should so destroy.

That part of the Circuit Court of Appeals Eighth Circuit decision rendered February 24th, 1939, is in error relating to petitioner's premium payments on the $50,000.00 policy reduced to $25,000 as this defendant letter to petitioner dated July 25th, 1934, (signed M. M. McKenny) but over the signature of L. C. Shellhorn, Cashier, mentioned in Certified Record on appeal of equity suit charging FRAUD as appearing on page =68-69 petition for writ of certiorari, No. 587 in above cause proves.

This defendant here advised your petitioner that he not only would receive a given sum of money for surrendering defendant policies, also reducing the $50,000.00 policy to $25,000, but as it will be noted, premiums on the reduced

policy (Policy No. 8 611 895 in above cause) was paid up in advance until *January 2nd, 1935*. Policy No. 8 611 895 was lapsed by this defendant long before that date in 1934.

Your petitioner, after filing petition for suit in equity charging *FRAUD* in a Missouri State Court, October, 1935, was transferred by defendant to Federal Court, tried November, 1936; appealed a Federal Court entered temporary injunction stopping proceedings in a Missouri State Court because the Federal Court "missed the bus" and failed to "administer JUSTICE" when the suit in equity charging FRAUD was before Federal Court; and because the Federal Court wrongfully, and without legal RIGHT, injected into decision rendered issue on permanent and total disability under policy disability clause in policy No. 8 611 895, all contrary as well to controlling LAWS of Missouri, the controlling LAW of the United States Supreme Court (decision written by Mr. Justice Cardozo) also injecting into the rendered Federal court decision other issues having no legal RIGHT there as well, the Circuit Court of Appeals, Eighth Circuit, on decision rendered February 24th, 1939, rules your petitioner, if permitted to go into his own Missouri State Court and try this defendant for FRAUD the Circuit Court of Appeals, Eighth Circuit, refuse to permit your petitioner to so enter his own Missouri State Court on an issue of *DISABILITY* against this defendant, as to so permit, your petitioner would *FRAME* this defendant in a Missouri State Court on *FRAUD*.

Your petitioner here states Missouri courts perhaps know something about this defendant FRAUD against policy holders from some of the comments of Honored Missouri Judges in the rendered decisions set out in foregoing brief.

Your petitioner has quoted in excerpt, page #31 of foregoing brief on motion for rehearing that part of the decision rendered by Circuit Court of Appeals Eighth Circuit for the purpose here.

The Circuit Court states by its rendered decision it is the LAW that after a Federal Court in equity has decided the equitable issues adversely to the petitioner, such court has lost jurisdiction to try and determine legal issues. Sec. 265 U. S. C. Tit. 28, Sec. 379, to stay the law action in the state court.

Petition for writ of certiorari, No. 587, page ≡58 to page ≡87,

All that has happened since the above cause on a petition for suit in Equity charging FRAUD went before the Federal Court for trial (November, 1936) has been the injection of so-called Federal judiciary "legal technicalities"—"legal intricacies"—the same old defendant methods and attempts which worked for a long period of years in Missouri, but finally it failed (Missouri State Established Law on insurance policy disability clause) and it would also seem to have failed in Virginia from court decisions above quoted. Delayed JUSTICE, high court costs policy holder can't pay contrary to the State control law, rendered decisions, taken over and into the Federal judiciary all the legal imbroglios, publicly charged "Insurance Corruption by the State citizen, at least in Missouri, and your petitioner was selected by this defendant unquestionably as the victim to accomplish it for them in Missouri and route State established law in Missouri by reinstating in Missouri courts past *INSURANCE CORRUPTION* which was even running ahead of your petitioner from Missouri courts over into Federal Courts of Missouri, as by *INSURANCE CORRUPTION* deceiving a *three judge Federal Court in Missouri* (comprised of Federal judges in Kansas City and Circuit Court of Appeals Eighth Circuit) Missouri courts, losing control of a colossal sum of money ten to twelve millions of dollars first impounded and protected by Missouri courts, it finally fell heir to a *three judge Federal Court* in Missouri to *protect* it and this *three judge Federal* court *failed* to so

protect. Policy holders money went to a group of some 137 different insurance companies. That some of this insurance was *HONEST* seems possible, but to your petitioner *DOUBTFUL*, but whatever the case proves to be it is assured at this time the *DISHONEST* Insurance controlled the *HONEST*.

Missouri Courts, however, also *impounded a smaller sum* (about a million and a half) belonging to *Missouri policy holders* and this was *not transferred* to the *Federal judiciary, Missouri courts protecting it.*

Your petitioner makes this explanation here to show Missouri courts, and by long years of experience, have learned the *JUSTICE* in protecting policy holders, apparently not so susceptible to *CORRUPT INSURANCE* deceiving them.

Surely this defendant tried as much and perhaps more to deceive Missouri courts discovered Missouri State Established Law on insurance policy disability clause—the *AMBIGUOUS* policy clause—would be legally interpreted to be *AMBIGUOUS* in Missouri, had been and would continue to be, so your petitioner was taken out of a Missouri State court over into Federal Court. Result: The same *Federal judiciary legal imbroglio* as existed in Missouri State courts before *Missouri adopted Missouri State established law* as foregoing petition makes a humble attempt to write a history on from page one to page twelve.

As Mr. Justice Cardozo said in his rendered decision to now be quoted below—"No question is here as to any general principle of the law of Contracts of Insurance * * * with consequences broader than those involved in the construction of a highly specialized condition. All that is here for our decision is the meaning, the tacit implications, of a particular set of words, which, as experience has shown, may yield different answers to this reader or to that one. With choice so balanced with doubt we accept as our guide

the *law decided by the State where the contract had its beginning*".

Generally with insurance policy disability clause phrased somewhat different, one policy against the other, if the Insurance Company issuing a policy with its disability clause, its policy holders finding their way to Courts, both State and Federal, in droves, one at a time, unorganized, seeking legal interpretation of the disability clause in such a policy, surely the courts know, either State or Federal, the policy disability clause is *AMBIGUOUS*. This defendant with its form policy No. 8 611 895 in above cause, with its disability clause has been in continued court litigation on the issue of whether the disability policy clause was *AMBIGUOUS*, and time and again, in Missouri, defendant disability policy clause was held by court decision to be *AMBIGUOUS*. Finally, Missouri State Established Law on insurance policy disability clause settled it for all time until courts themselves, either Missouri or the Supreme Court of the United States, change it.

The defendant Court litigation with your petitioner here, and in above cause, aimed from the very start to obtain a *Federal court* decision in *disagreement with Missouri State Established Law on insurance policy disability clause, and with the hope, if so secured, for a United States Supreme Court concurrence with such Federal court disagreement.*

It is plain this has always been the issue. Was the Federal judiciary issue in Virginia, Pennsylvania as well?

With the rendered Federal court decision, November, 1936, with official hospital report subpoenaed, yet not produced as evidence before Federal court trial, with subpoenaed witness not testifying at trial (why did not matter) had the Federal court decision been appealed it might have jeopardized some three million policy holders in Missouri by adverse decision and by the Supreme Court of the United States. Hence the Federal court decision was not appealed.

The cost to appeal ($1500.00 as attorneys advised) was then beyond petitioner's resources, drain of disability and litigation, a method used by this defendant to avoid discussions with policy holder, delay, win in LAW. The defendant's deliberate aim here, your petitioner gradually was convinced, was a Federal judiciary general and legal interpretation the policy clause was *NOT AMBIGUOUS* and thus route *State Established Law.* In Missouri this defendant had failed to do so after years of effort.

Quick *JUSTICE* was assured under United States Supreme Court *LAW* if this *defendant directorate, advertised in the press* and magazines at great cost, *DIRECTORS WORKED WITHOUT SALARY, PROTECTING POLICY HOLDERS, GLADLY INVITING POLICY HOLDERS TO WRITE THEM FREELY, AND DIRECT, FOR THEIR POLICY PROTECTION.* Such an advertisement in the Saturday Evening Post influenced your petitioner to write this directorate in March, 1936, months before litigation was before Federal court. (See page 62 below, also petition for writ of certiorari page ≠28-41-32-33.) In fact, defendant directorate invited petitioner to settle the issue in court long after Federal court decision, November 23rd, 1936, with full knowledge on dispute long before November 23rd, 1936. *While Federal court decision not appealed,* as the *Federal court decision ruled adversely to your petitioner on petition for suit in equity charging FRAUD, Federal court had lost jurisdiction to pass on legal issues in decision, hence Supreme Court LAWS gave petitioner RIGHT to re-enter his own Missouri State Court. When petitioner did Federal court stopped State court proceedings, Federal court injunction was appealed.* Petitioner advised Federal court decision could not be appealed effectively, and why, that is, decision rendered November 23rd, 1936.

Your petitioner has always been convinced there was a conscientious difference of opinion between the Supreme Court of the United States LAWS governing *State Controlling LAWS* and what the Missouri Federal judiciary membership wanted to be the LAW. The Missouri end would "WRECK" democracy. If the Circuit Court could find ground for legal technicalities (which do not exist) in affirming equity issue Federal court entered injunctions stopping proceedings in Missouri State court, surely there did exist ample Federal judiciary LAW, both State and Federal, to justify the Circuit Court of Appeals, Eighth Circuit, to raise the question as to why Federal court, on a petition before it for suit in equity, charging FRAUD, rendered decision also injecting the issue of disability, and even there, contrary to Missouri State Established Law, supported by the United States Supreme Court decision written by Mr. Justice Cardozo, so frequently mentioned here, and also Supreme Court of United States decision rendered by Mr. Justice Brandeis previously quoted in both cases and to follow here in full reference. The Circuit Court rendered decision injected laws cited as precedent cases to justify affirming Federal court injunction not submitted by petitioner or defendant in the appeal and argument on Federal court entered injunction stopping proceedings on appeal, before it, in a State court.

This defendant has charged petitioner with not conforming to rules and regulations of the Federal judiciary. Your petitioner assures this Honorable Court to the best of his ability Federal judiciary rules and regulations have been read and followed.

On the other hand "the administration of justice", as intended by the Constitution of the United States, intends courts will observe, follow, and render decisions proving within themselves JUSTICE was "administered". *JUSTICE* has been denied your petitioner both by the Federal

court and the Circuit Court of Appeals, Eighth Circuit, and the written decision does appear in the above entitled cause in proof thereof. A colossal number of insurance policy holders have been denied JUSTICE by Federal judiciary courts in Missouri, and publicly charged *INSURANCE CORRUPTION* laid at the door of Missouri Insurance by the press of the State. If insurance policy holders have made gains towards the quick "administration of justice" by Federal courts since Federal court rendered decision here November 23rd, 1936, it is here the effort of your petitioner to retain it both for himself and his other insurance policy holders.

As set out on page #1 of foregoing brief, in argument on motion for rehearing, this concludes clause #2 and we pass on to the next:

In the order named on page #1 of this brief, paragraph #3.

UNITED STATES SUPREME COURT GOVERNING LAWS.

The jurisdiction of Supreme Court is invoked under Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938 (28 U. S. C. A. 347a) and under same ACT, Chapter 229, Section 8, 43 Stat. 940 (28 U. S. C. A. 350).

By the Provisions of Section 379, U. S. C. A., Title 28, Section 265, Judicial Code, *A FEDERAL COURT MAY NOT STAY PROCEEDINGS IN A STATE COURT WHERE THOSE PROCEEDINGS ARE IN PERSONAM.*

* * * * * * *

Mutual Life Insurance Company of New York v. *Johnson, 293 U. S. 335, 340.*

Argued November 15th, 1934, decided December 3rd, 1934.

Mr. Justice Cardozo delivered opinion of Court.

On writ of certiorari to the United States Circuit Court of Appeals for Fourth Circuit to review a judgment of the District Court of the United States for the Western District of Virginia on a verdict directed for *defendant* in an action on a life insurance policy.

Affirmed. See case below, 70 F. (2d) 41.

When last premium on insurance policy due for life coverage, with disability provisions, the insured was confined to his bed, a sufferer from chronic nephritis which later resulted in his death. There was evidence he was permanently and totally disabled, not only mentally, but physically to such extent he was unable to give notice. The Insurance Company takes the position, that due to the omission of the notice, the default is unexcused and the policy lapsed.

Conflict of Laws. Interpretation Life Insurance Policy

1) A Life Insurance Policy is to be interpreted in accordance with the law of the state in which it was delivered to the insured, where resident.

COURTS **850; Federal Courts following State Decisions—Insurance Matters.*

2) In determining whether the giving of the notice of total and permanent disability of the insured contemplated by the provisions of the Life Insurance Policy that the insurer will waive premiums becoming due during such disability, after due proof thereof, is excused by the physical and mental incapacity of the insured to give such notice, the Supreme Court of the United States will follow the law of the state in which the policy was delivered to the insured, there resident.

*COURTS, *788; Federal Courts following State decisions—in general.*

3) In cases of uncertainty the federal court should follow the decisions of the courts of the state in which the transactions in question took place when harmony can thus be obtained without the sacrifice of ends of national importance.

In this action the District Court upheld the Company's position and directed a verdict for defendant. The Court of Appeals for the Fourth Circuit reversed and remanded the case for retrial; 70 F. (2d) 41.

For the defendant it was argued that insanity is no more an excuse for the failure to give a notice that will cause the payment of premiums to be waived, than for the failure to make payments of premiums when waiver is not a duty either conditional or absolute; Cf. Klein *v.* New York Life Insurance Company, 104 U. S. 88, 26 L. Ed. 662.

For the plaintiff it was argued that waiver having been promised, though subject to a condition as to notice, there must be a liberal construction of a re-

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quirement that is "merely modal or procedural, and the insured will not be deemed in respect of matters of that order to have executed the impossible.

(Numerous precedent cases quoted in support of both defendant and plaintiff.)

The controversy is one as to which the courts of the country are arrayed in opposing groups.

The highest court of Virginia spoke as to the meaning and obligation of such a policy; Swan *v.* Atlantic Life Insurance Company, 156 Va. 852, 159 S. E. 192, supra, construing a provision substantially the same as the one in controversy here. The ruling there was that notice was excused by physical and mental incapacity to give it.

When the disability of the insured occurred while the policy was in force, he was entitled to have the pre-

miums waived until his death, for the disability continued until his death. He had paid for this right, and to say that he should lose the benefit of his policy because he failed, through mental and physical incapacity, to present proofs, would be harsh and unreasonable under the circumstances.

In this situation we are not under a duty to make a choice for ourselves between alternative constructions as the Courts of the place of contact were silent and uncertain. Without suggesting an independent preference either one way or the other, we yield to the Judges of Virginia expounding a Virginia policy and adjudging its effect. The case will not be complicated by a consideration of our power to pursue some other course. The summum jus of power, whatever it may be, will be subordinated at times to a benign and prudent comity. At least in cases of uncertainty we steer away from a collision between Courts of state and nation where harmony can be attained without the sacrifice of ends of national importance. No question as to a "rule of the law merchant" is presented in this case; Swift *v.* Tysen, 16 Pet. 1 (340), 10 L. Ed. 865. No question is here as to any general principle of the law of Contracts of Insurance; (Carpenter *v.* Provident Washington Insurance Company, 16 Pet. 495, 511, 10 L. Ed. 1044, 1051, Ætna Life Insurance Company *v.* Moore, 231 U. S. 543, 5509, 58 L. Ed. 356, 366, 34 S. Ct. 186) with consequences broader than those involved in the construction of a highly specialized condition. All that is here for our decision is the meaning, the tacit implications, of a particular set of words, which, as experience has shown, may yield different answers to this reader or to that one. With choice so balanced with doubt we accept as our guide the law decided by the state where the contract had its beginning.

The Judgment Is Affirmed.

* * * * * * *

Erie Railroad Company v. *Tompkins*, No. 367, U. S. Reports, Vol. 304, Page 64, October Term, 1937.

Argued January 31st, 1938. Decided April 25th, 1938.

Carpenter v. *Wabash R. R. Co., et al.*, 309 U. S. —23, No. 230 (1, 2). Decision rendered January 29th, 1940.

PETITION FOR WRIT OF CERTIORARI—Page #77.

ARGUMENT.

POINT A.

By the Provisions of Section 379, U. S. C. A., Title 28, Section 265, Judicial Code, a *FEDERAL COURT MAY NOT STAY PROCEEDINGS IN A STATE COURT WHERE THOSE PROCEEDINGS ARE IN PERSONAM.*

POINT B.

THE COURT, HAVING DETERMINED THE EQUITABLE ISSUES IN *THE ORIGINAL EQUITY PROCEEDINGS ADVERSELY TO PETITIONER. LOST JURISDICTION TO DETERMINE THE LEGAL ISSUE OF DISABILITY.*

POINT A.

It is clear that the original action in equity to avoid the reduction in the amount of the policy and to procure a reinstatement of that policy was an action *IN PERSONAM.*

It is clear that the action at law in the State Court brought by petitioner's assignee upon the policy to recover disability benefits was also an action *IN PERSONAM.*

Decision rendered by the Circuit Court of Appeals, Eighth Circuit, quoted in excerpt, page 43 foregoing brief in argument on rehearing granted by this Supreme Court said—

"After that final adjudication had been made and decree entered, a law case for recovery of *disability* ben-

efits has been *INGENIOUSLY MADE OUT OF THE FACE OF A PETITION IN THE STATE COURT BY SIMPLY OMITTING THE FACTS AS THEY WERE ESTABLISHED BETWEEN THE PARTIES IN THE FEDERAL EQUITY SUIT, etc.*"

The said decision then continues and says, quote—

"*THE HOPE OF THE PLAINTIFF IN THE LAW CASE MANIFESTLY IS TO FRAME THE PLEADINGS SO AS TO ASSERT A CLAIM OF FRAUD AGAINST THE COMPANY IN A SUBSEQUENT PLEADING.*"

The Circuit Court of Appeals, Eighth Circuit, in the foregoing excerpt of said decision thus quoted on this page said in the same decision (first quotation in excerpt quoted on page 43 foregoing brief in argument on rehearing granted by this Court) that it *WAS THE LAW* declared by the Supreme Court of the United States under the statutes set out at the top of this page this Federal court did not have a legal RIGHT to enter temporary injunction stopping proceedings in a State court on appeal before the Circuit Court. In precise language the Circuit Court of Appeals, Eighth Circuit's decision said—"It is well settled where a bill states a case entitling the complainant to equitable relief, if the proof fails to establish the averments of the bill in that respect, *the court is without jurisdiction to proceed further and determine rights in a court at law, etc.*"

It is, of course, clear the Federal court exceeding its *LEGAL RIGHT* (and so admitted by decision by Eighth Circuit Court of Appeals) it was the duty of the Circuit Court to overrule the Federal court. Instead the Circuit Court *affirmed*, by said decision, Federal court's *judgment*.

From the same Circuit Court decision it is also *CLEAR* the Circuit Court *(notwithstanding the controlling Su-*

preme Court LAW of the United States Supreme Court so permitted) saw fit to deny your petitioner to exercise his *LEGAL RIGHT* by trying this defendant in petitioner's own *State court of Missouri* in order to not only obtain *JUSTICE*, but to bring this defendant to *JUSTICE*, the Circuit Court ruling as its reason—"*THE HOPE OF THE PLAINTIFF IN THE LAW CASE MANIFESTLY IS TO FRAME THE PLEADINGS SO AS TO ASSERT A CLAIM OF FRAUD AGAINST THE COMPANY IN A SUBSEQUENT PLEADING*".

It should be clear (and clear to the Circuit Court of Appeals, Eighth Circuit, with what facts did get before it) if your petitioner was trying to "FRAME" a case of "FRAUD" against this defendant, in October, 1935, petitioner would have filed "suit at law" and been satisfied to *FRAME* this defendant on the amount of $25,000.00 defendant policy No. 8 611 895 had been reduced to by defendant, and by FRAUD.

Instead, this defendant, and by FRAUD reduced policy No. 8 611 895 from its original amount ($50,000.00) to amount of $25,000.00. The only means possible for your petitioner to reinstate policy to original amount of $50,000.00 was to file suit in Equity, charging *FRAUD*, in a Missouri State Court October, 1935. This defendant elected to transfer suit from Missouri State Court over into Federal court.

Here, and by decision, the Circuit Court of Appeals, Eighth Circuit denies your petitioner his legal right to prosecute this defendant in his own Missouri State Court by *affirming* Federal court temporary injunction entered stopping proceedings in Missouri State Court.

Your petitioner spent most of his lifetime as a railroad operating officer, and on America's greatest western transcontinental Railroad, supervising some thirty thousand employes with a ring of steel (these employes) successfully

mastered stretching over two of the highest mountain peaks thus putting "human cargoes" both "over the top" or "under the bottom" through tunnels well over a mile long and without *REDUCING SPEED*, and in all these years your petitioner so carried on, not a one single passenger was ever injured or killed, nor delayed. Why? Railroads had discovered in well over one hundred years its LAWS must be obeyed; nor would a railroad officer, much less its employe, change such railroad governing LAWS or deviate therefrom without knowing it was a deliberate attempt to *WRECK* both the railroad, its human cargoes and themselves. The *DISASTER AHEAD* is the Railroad watch word. Railroad Officers and its employes, even fighting with each other at times, did not wreck the American Railroads financially. Law permitted privileged groups to do so.

Here we find a Federal judiciary in Missouri disregarding Missouri State established law on insurance policy disability clause, also openly disregarding a United States Supreme Court 1934 rendered decision legally interpreting the insurance policy clause to be *AMBIGUOUS*, decision stating plainly why it was so *AMBIGUOUS*, said decision based on the State of Virginia where Federal court for the Western District of Virginia declared it to be the LAW policy clause was *NOT AMBIGUOUS*, but the Circuit Court of Appeals for the Fourth Circuit in Virginia overruled the Federal court, the Supreme Court of the United States affirming decision by Virginia Circuit Court.

For the Missouri Federal judiciary to do this the same Missouri Federal judiciary first had to disregard the governing United States Supreme Court LAW, so fully set out above and in petition for writ of certiorari, No. 587—(Page #81, under POINT B) in above entitled cause. Here it had its beginning by your petitioner, filing in Missouri State Court, October, 1935, petition for suit in equity charg-

ing FRAUD, transferred to Federal court for trial, as it was, the whole Federal judiciary discussion ever since has been on the issue of insurance policy disability clause and *DISABILITY* thereunder.

There was one period in the history of the state of Missouri (and undoubtedly also Virginia) where the outraged citizenry might, if not rendered *JUSTICE by LAW*, wrecked their own State, and unquestionably the Missouri State Established Law as disagreed with here by the Federal court decision, November 23rd, 1936, might have eliminated the outraged citizen of that era.

Your petitioner thus calls attention to the effort by defendant insurance company to have Missouri State LAW declare the disability clause in policy No. 8 611 895 in above cause as *NOT AMBIGUOUS*. Contrary to United States Supreme Court LAW, and on a suit in equity charging FRAUD, the *Federal court for the Western District of Missouri*, by decision, ruled disability clause in policy No. 8 611 895 *not to be AMBIGUOUS*. *Missouri State courts* had repeatedly, and by decision, previously ruled disability clause in policy No. 8 611 895 *to be AMBIGUOUS*, also well over a long period of years during every minute, every hour, every day and yes, every year this defendant resorted to every known means under a so called legal imbroglio to influence *Missouri State courts* to grant their pleadings, declare policy clause in policy No. 8 611 895 to be *AMBIGUOUS by LAW*, but this defendant *failed in Missouri as Missouri court decisions quoted in excerpt in foregoing brief in argument on rehearing granted show comprising such a small part of this defendant proof of activity within the State of Missouri, but your petitioner considers more than sufficient here.*

Your petitioner prays the Supreme Court of the United States will over-rule lower courts and find in favor of your petitioner.

WRIT OF CERTIORARI, NUMBER 587 AMENDMENT.

In petition for writ of certiorari, No. 587, page #28-32-33, the defendant *directorate* invited petitioner to take the issue to the courts for settlement.

Petitioner's defendant directorate contact occurred long before the Federal judiciary became involved in this litigation. Petitioner, therefore, here quotes below defendant Director Hale Holden's personally signed letter to petitioner dated *New* York City, *March 31st, 1936.* Quoted in full:

> "I find your letter of March 21st, on my recent return from an extended inspection trip over our lines, which accounts for delay in acknowledgement.
>
> I recall meeting you on the Union Pacific years ago during a trip over your division upon which you accompanied me.
>
> Naturally my relationship to the New York Life does not acquaint me with the technical conditions and details relating to the several forms of policies which it issues and, therefore, I am not able to express my opinion as to the situation affecting yourself which you recite. Knowing the Company as I have it would be perplexing to feel that its representatives would be actuated by any but the correct and, I feel, most liberal construction of the rights of a policy holder, but in order to do what your letter suggests and notwithstanding that you have marked it personal and confidential, I am sending it to the President of the Company, competent that he will put the matter in line for reexamination and such action as in accordance with the standards of the company he may determine. I have no doubt that in due course you will hear from him or from such officer as he may delegate to handle your case.
>
> With best wishes for a lasting improvement in your health, I am".

Mr. Hale Holden became ill and died some time after his above letter to me dated *March 31st, 1936.*

Your petitioner's letter to Mr. Holden (dated March 21st, 1936) advised Cashier Shellhorn of the Kansas City Branch Office had admitted to petitioner before defendant official, Mr. M. M. McKenny that "in June, 1934, he, Shellhorn, did, on petitioner's request on him, send his Mr. Wells to petitioner's office to secure petitioner's four defendant policies to analyze to see if said policies contained a health provision, etc.", and naturally under such a condition if the *disability policy clause* intended the defendant company should meet its obligation to policy holder, suit in equity filed in Missouri State court charging FRAUD, October, 1935, could readily be disposed of by the defendant company arranging a joint meeting in Kansas City, having their officers, Cashier Shellhorn, his assistant, Mr. Wells and Mr. McKenny present, together with your petitioner, and settle the dispute. Petition for writ of certiorari, number 587, pages #28 to page #34 inclusive shows how and where petifioner met these three defendant officials, not until Federal court called trial to order, November 18th, 1936.

A $100,000.00 defendant policy holder, paying this defendant premium of $5,000.00 yearly, aggregating well over fifty thousand dollars since 1924 could not obtain even a joint discussion with three of Kansas City Branch office officials where one (Wells) occasionally called at petitioner's office voluntarily, but testified in Federal court, November, 1936, he, Wells, "had never been in petitioner's office in his life." He, Wells, as petitioner's secretary testified in Federal court called at petitioner's office morning of June 29th, 1934, advised was sent by Cashier Shellhorn to obtain defendant policies to analyze, was given policies by petitioner's secretary—and in petitioner's presence, then he, Wells, left the office and never since returned, Mr. McKenny, however, appeared late in July, 1934, in petitioner's

office, was unknown to petitioner, not invited, and made to identify himself. It is a peculiar coincidence one of petitioner's Federal court subpoenaed witnesses, subpoena served while Shellhorn and Wells testified in Federal court, would walk into petitioner's office within the hour after Wells left on morning of June 29th, 1934, and request petitioner to let him have defendant policies to analyze for a Health provision and advise petitioner if policies contained such a provision, and if so, terms. This same subpoenaed witness in September, 1933, made same request at Kansas City Club upon petitioner (never being in petitioner's office but once, morning of June 29th, 1934), but on September, 1933, petitioner declined request, while on morning of June 29th, 1934, defendant witness had been advised, in response to request made, Wells of defendant Company had just left office with defendant policies to analyze for same thing. The proof is Shellhorn left witness stand in Federal court, then left Federal court room with attorney, called at office of Mr. Mura and requested Mr. Mura not to testify to his knowledge, etc. (See petition for writ of certiorari, No. 587, pages #14-15-33-34.)

Defendant Brief In Opposition to petitioner's petition for writ of certiorari, No. 587, and before this High Court took jurisdiction January 6th, 1941, page SIX states "*some of the matters contained in petition are not only unfounded in the record, but SCANDALOUS*". Director Hale Holden in this defendant Insurance Company was also the head of one of America's great Railroads and met petitioner back in 1914 but once as Mr. Holden states in said letter quoted above. Mr. Holden was held in high esteem by the railroad world, and by the employment, wrote your petitioner later than date above letter quoted and died without knowledge this defendant would not hold joint meeting with petitioner and its three officers. This defendant knows,

wrapped up in petitioner's interchange correspondence with its directorate there does exist something *SCANDALOUS*, also in defendant requesting prospective witnesses how to testify in Federal court following its paid hypothetical medical witnesses. Yet, it aimed to infer to this High Court in its Brief In Opposition to the granting of petitioner's petition for writ of certiorari the "*SCANDALOUS*" incident undoubtedly had to do with petitioner's statements in petition for writ of certiorari, No. 587, pages #47-48-49. On February 10th, 1941, a Missouri Jackson County Court decision proved petitioner's charges appearing on page #49 of writ.

Your petitioner inserted the statements appearing on pages #47-48-49 of writ for the reason if this defendant had a department head in Greater Kansas City a charter subscriber to such an atrocious association as stated whose effort was to "PACK" the jury boxes in all Jackson County Courts. Insurance representatives should not be writing or advising citizens, Banks using monthly bank prospectus, etc., to propagandize the public President Roosevelt was "PACKING" the Supreme Court of the United States as it could not be proved on President Roosevelt, but it could be proved, and against this atrocious association, initiated by Insurance, right here in Jackson County of Missouri. In fact a Missouri Court Jackson County rendered court decision proved it, your petitioner believes, February 10th, 1941. Petitioner made this statement in motion for rehearing filed April 17th, 1941, pages 14-15.

So far as the public comment made by a member of the Federal judiciary as set out on page #47-48 of writ is concerned, your petitioner, while not agreeing with the public assertion, would fight just as hard, taking the same chance and more if need be in world war number one, this Honored member of the Federal Judiciary had a RIGHT to so state publicly. For that matter, your petitioner did not

know, had no means to know, what the political philosophies of the Honored personnel of the United States Supreme Court, if any, might be. This defendant would take no such chances to lose a law suit as its methods are diametrically opposite. With two Honored Judges resident of Missouri mentioned on pages #47-48-49 of writ, one was an Honored member of the Federal judiciary and the other Honored Judge of the Honored Missouri State Court of Jackson County. The Honored Federal Judiciary member received, and here received front page highly favorable newspaper mention and this defendant was foremost in applause. The other Honored Judge of the Missouri State Court generally receives newspaper criticism or articles appear not wholly complimentary. During the hearing before his Missouri State Court preceding decision rendered dated February 10th, 1941, (as mentioned page 14-15 motion for rehearing granted) no mention was made by the press of this City on the sensational evidence put before the court which was TREASON against Democracy and the proof your petitioner is convinced was produced with the rendering of decision by this Missouri Court February 10th, 1941. It requires no courage to take compliments, but it does require "courage" to take criticism from a group control of some *SEVENTY BILLIONS OF DOLLARS* which, however, is owned by insurance policy holders and this defendant has well over fifty thousand dollars of it my legal money. An individual is greatly Honored when becoming a Judge, and always greatly respected, and your petitioner has yet to know or hear of a Judge he does not respect. It is unnecessary to agree or respect all of their rendered court decisions as a Judge, like anyone else can be deceived. This defendant not only deceived your petitioner, but defrauded him. Your petitioner believes it would as readily defraud a Judge, and under the disability clause in the in-

surance policy if it could. Law decisions already rendered prove that also.

The Constitution assures all citizens of a quick "administration of justice". Justice has been denied your petitioner before the courts of State and Nation with the beginning in October, 1935. The Federal judiciary first denying to "administer justice" as intended, prevents a State court to function.

S. R. TOUCEY.

#131 West 61st Terrace,
Kansas City, Mo.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 16

SAMUEL R. TOUCEY,

Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY,
A CORPORATION.

PETITIONER'S SUPPLEMENTAL BRIEF IN ARGUMENT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner served on defendant September 24th, 1941, copy of Brief In Argument filed with The Supreme Court of the United States September 24th, 1941; and on September 25th, 1941, defendant served on petitioner copy of Respondent's Supplemental Brief. As set out on page One, last paragraph, petitioner's Brief In Argument your petitioner desires to answer Respondent's Supplemental Brief and prays the Supreme Court will so order.

Quotations from Respondent's Supplemental Brief above mentioned will follow as set out here:

QUOTATION ONE—RESPONDENT'S SUPPLEMENTAL BRIEF, page #1 and #2:

> "In Respondent's Brief it is shown that one of the long established and well recognized grounds of injunctive relief by supplemental bill is to prevent relitigation in another court of issues finally settled by a *decree in equity* (Respondent's Brief, p. 17 et seq.). We also showed that the uniform decisions of this Court for at least the last *fifty years* have held that Section 265 of the Judicial Code (Sec. 379, 28 U. S. C.; R. S., Sec. 720) does not prohibit the issuance of an injunction to prevent a party from re-litigating in state court issues already *adjudicated by a federal equity court* (Respondent' Brief, page 21 et seq.). We pointed out that the present is such a case and, therefore, that if the uniform prior decisions of this Court are still the law the ruling of the Eighth Circuit in this case (102 Fed. 2d 16 and 112 Fed. 2d 927) must be affirmed.
>
> This court has, however, granted certiorari in several cases bearing no similarity on the facts to this case and having the single characteristic that lower federal courts had enjoined the parties for various reasons from proceeding in state courts. At least three of these cases were decided by this Court by four to four votes and have been set down for argument on the opening day of the October term. The remaining case (of which we know) is still pending here on petition for certiorari. It is therefore evident that *this Court* is primarily *interested* in a question of *judicial policy* rather than in the *justice or injustice* of the ruling in any particular case.
>
> "We can only guess the sources of this new interest in a subject on which the law, both federal and state, as well as the law of *England* and its dominions, has long been settled. We believe that *some members of this Court* doubt the wisdom of permitting the federal courts to enjoin parties from pr[illegible]edings in state

courts under any circumstances and therefore wish to review the purpose and scope of Section 265 with the object of changing its present interpretation". End quote.

QUOTATION TWO from Respondent's Supplemental Brief, page #32:

> "*A member of this Court inquired at the original argument why Respondent's remedy was not adequate by pleading the decree of the district court at bar of the State Court suit, and suggested that if the Supreme Court of Missouri refused to honor the plea this Court would exercise its power of review by certiorari.* Since the identity of issues between the pending state court suit and that concluded by the decree below has never been denied, the public interest in terminating this litigation requires that the matter be now concluded by affirming the relief granted the respondent below. Is it just or proper that in order ultimately to prevent this attempt to relitigate the same issues decided by the Federal Court, respondent should be put to its defense in the State Court, subject to a probable appeal, and then have to rely in the final outcome upon the discretionary power of this Court either to grant or refuse a petition for certiorari to obtain a ruling on what is not disputed, namely, that the issues in the two courts are, in fact, identical. We submit that it is not."

It is clear by this defendant's own words in the foregoing quotation respondent's remedy was adequate by pleading the decree of the District Court in bar of the state court suit, and if the Supreme Court of Missouri refused to honor the plea the Supreme Court of the United States would exercise its power by certiorari. Just why this defendant *FEAR* the *Supreme Court of the United States would deny this defendant JUSTICE on certiorari?* On Respondent's supplemental brief, pages #5-6-7-8-9 defendant's apparent strongest precedent case is cited and defendant states (page #7, last paragraph) "*The Similarity in substance between*

that case and this is striking. Here Toucey was defeated in his original action and a decree dismissing his bill on the merits duly entered (R. 43) Thereupon on December 28th, 1937 (R. 22) more than a year after the original equity action, one James Shay, a citizen of the District of Columbia, brought suit against respondent in the Circuit Court of Jackson County, Missouri (R. 53) alledging that he was the assignee of Toucey's cause of action, etc.".

On Petitioner's Brief In Argument, page #5 decision rendered by the Supreme Court of Missouri, Division Number 1, is found quoted in excerpt Supreme Court of Missouri's rendered decision in the *Heald* v. *Aetna Life Insurance Company.* It is an important fact *cited as a precedent case before the Supreme Court of Missouri in said decision was the Rickey* v. *New York Life Insurance Corporation's case so fully quoted by petitioner in excerpt, page #4 on motion for rehearing granted on April 28th, 1941, by Supreme Court of the United States.* Due reference was made by petitioner in Brief In Argument also to the *Rickey* v. *New York Life* Case in prominent points of argument. Here in the *Rickey* v. *New York Life Corporation's* case is to be found this same defendant's policy sold to appellant Rickey back in *1921* with the same identical policy disability clause as is to be found in defendant's policy No. 8 611 895 as sold to your petitioner (and by FRAUD, see petition for writ of certiorari-amendment, page #23-24-25-26-27-28) on *April 29th, 1924.*

It is clear this defendant, and so found by Missouri Courts, in the *Rickey* v. *New York Life Insurance Corporation's* said case with policy sold by defendant in *1921* kept up a continuous *Missouri Court litigation* here until finally on *May 8th, 1934, Missouri Court of Appeals rendered decision.*

In all this period of years before Missouri Courts, starting out with a jury verdict in the *Rickey-New York Life* case, the Missouri Court of Appeals decision May 8th, 1934,

said in part—"*Plaintiff's evidence must be deemed true, defendant's CONTRADICTORY EVIDENCE MUST BE DISREGARDED, and plaintiff must be given benefit of all reasonable and favorable inferences arising from his evidence*". From the start to finish of said *Rickey-New York Life Corporation's* case not a single one of Missouri Courts ever found anything favorable to this defendant, much less mention it in court decisions.

Yet here in the above entitled cause your petitioner with defendant policy No. 8 611 895 with same identical policy disability clause as in 1921 policy by appellant Rickey has been before the Federal judiciary of Missouri since November, 1936, to this date and aside from the order entered on a four to four division of the Supreme Court of the United States entered April 7th, 1941, not one favorable word has been said by the Federal judiciary in favor of your petitioner.

QUOTATION THREE from Respondent's Brief, pages 38-39-40:

CONCLUSION in excerpt, page #38.

"By the time the Court reaches this CONCLUSION it will have read both Respondent's Brief and Respondent's Supplemental Brief and will, therefore, have reviewed many of the principal cases in the United States declaring and applying the principal of law before the Court for review. It will, therefore, be apparent that the Court is not here dealing with a peculiar abuse of federal power contrary to the Statutes, or with an attempt by the national courts to supervise or control the State courts, or with a principal in any sense peculiar or even originated by the national courts. On the contrary it has before it for review the invocation by the District Court of a principle of universal application both here and in *England, etc.*"

Quoting from last paragraph, page #38, Respondent's Supplemental Brief:

> "When, therefore, the question examined is not merely 'what have the federal equity courts done?' but 'what have all Anglo-Saxon Courts done when faced with an attempt to litigate elsewhere issues already adjudged in equity, etc."

Quoting from last paragraph, page #39, Respondent's Supplemental Brief:

> "In closing we respectfully request the Court to bear this further observation in mind. At the time when this statute (Section 265) was first enacted (1793) as is well known, the states were acutely apprehensive that the federal power, including the power of the federal courts, might be exerted in a manner detrimental to and derogatory of the co-existing powers of the states and of the state courts. It is fairly inferable that many states feared that the federal courts might attempt improperly to interfere with the orderly and lawful processes of the state courts and prevent them from exercising their proper function, etc."

Quoting from closing paragraph on Conclusion, Respondent's Supplemental Brief, page #40:

> "We are *concinced* that *this Court will not proceed upon a tangent which would throw it out of harmony with all the other Courts of the Anglo-Saxon world. The decree below should be affirmed.*"

Respondent's Supplemental Brief (top of page #3) makes a slight specific reference to page #35 of Respondent's Brief. Here appears six classifications by this defendant on the direct issue petitioner's suit in equity charging defendant FRAUD as filed in Missouri State Court, transferred by defendant to Federal court (tried November, 1936) that the Federal court did "fairly" adjudicate the issue of equity FRAUD, found by decision adversely

to petitioner on issue of FRAUD; and then, as the same Federal court rendered decision injected the issue of *DISABILITY* (also other issues foreign to equity charge of FRAUD) the Constitution of the United States so intended and any and all laws ever enacted thereunder as well. In the finality of defendant's "Conclusion" on page #40 Respondent's Supplemental Brief states "We are convinced that this Court will not proceed upon a *tangent* which would *throw it out of harmony* with *all the other courts of the Anglo-Saxon world*".

In Respondent's Brief, page #36, second paragraph, is quoted defendant's Sixth classification it makes a stand on in the above entitled cause, but your petitioner believes, in a clearly *CONFUSED* and indefinite status—quote—

> "6. A Federal Court which has issued a final decree in equity adjudging the rights of parties will, upon the filing of a supplemental bill, enjoin the institution or prosecution in a State Court of an action, the object or affect of which is to relitigate and adjudicate issues settled by the decree of the federal court, or which would otherwise tend to nullify that decree or lessen or impair its effect".

With petition for *suit in equity filed in Missouri State Court, October, 1935, charging defendant FRAUD, transferred from Missouri State Court to Federal court and tried by Federal court, decision rendered November 23rd, 1936, when Federal court ruled NO FRAUD had occurred, as charged in equity, Federal court lost jurisdiction to rule on, or try and determine legal issues clearly under the PROVISIONS OF SECTION 379, U. S. C. A., Title 28, Section 265, Judicial Code, much less to later (and by Federal court injunction) stay proceedings in Missouri State court where those proceedings were IN PERSONAM.*

The Federal court, having *determined the equitable issues in the original Equity proceedings adversely to peti-*

tioner, lost jurisdiction (Section 379, U. S. C. A., Title 28, Section 265, Judicial Code) to determine the legal issues of DISABILITY under disability clause in defendant policy No. 8 611 895.

The Federal court in decision rendered November 23rd, 1936, *DID NOT ADJUDICATE petition for suit in equity charging FRAUD to a definite finality on the issue of FRAUD.* See rendered decision with reference to Exhibits #3 and #4 (Page #67 and pages #72 and #73 petition for writ of certiorari, also as mentioned in Transcript of Record, also elaborated upon by petitioner, page #17, Brief in Argument filed September 24th, 1941, with this Court).

Here with classification #6, as quoted above on this page, appearing on Respondent's Brief, pages #35-36, this defendant would lead the Supreme Court of the United States to believe that Section 265 of the Judicial Code was arrived at by the Congress of 1793 by first enactment for this defendant's full benefit, that your petitioner was a FRAUD, even supported by the Federal Judiciary of Missouri, dragged before such Honored Tribunal on a petition for suit in equity charging FRAUD filed in a Missouri State Court (October, 1935) tried by Federal court (November, 1936) issue of FRAUD not even "FAIRLY" adjudicated by Federal court and to a definite finality, the same Federal court stopping proceedings in Missouri State Court by power of Federal court injunction (your petitioner is convinced abuse of Federal court injunctive powers) only for the Circuit Court of Appeals, Eighth Circuit, to render decision on injunction appeal, first clearly stating by said decision (quote)

> "It is well settled 'where a bill states a case entitling the complainant to equitable relief, if the proof fails to establish the averments of the bill in that respect the court is without jurisdiction to proceed further and

> determine rights that are cognizable in a court of law.' It is also the rule 'that where a cause of action cognizable at law is entertained in EQUITY on the ground of some *EQUITABLE RELIEF SOUGHT BY THE BILL*, which it turns out cannot, for defect of proof or other reason, be granted, the Court is *WITHOUT JURISDICTION TO PROCEED FURTHER AND SHOULD DISMISS THE BILL AND REMIT THE CAUSE TO A COURT OF LAW'*. (Pages 13 to 38, Petitioner's Brief in Argument.)

But rendering decision February 24th, 1939, nevertheless affirming Federal court's judgment on the assumption your petitioner, under Section 379, U. S. C. A., Title 28, Section 265, Judicial Code, could and should try this defendant in his own Missouri State Court, but the Circuit Court of Appeals, Eighth Circuit, ruled petitioner could not as, "ingeniously" your petitioner going into a Missouri State court on an issue of disability would "*FRAME*" this defendant on *FRAUD*.

After an array of this defendant's briefs in colossal proportions put before the Federal court and Circuit Court of Appeals, Eighth Circuit, over the long period of years, defendant now culminates its effort on a thesis (Respondent's Brief) and yet a further enlargement thereon (Respondent's Supplemental Brief) and winds it all up with the admonition to the Supreme Court of the United States "not 'o proceed on a *tangent*, agree with the *INJUSTICE* rendered your petitioner BY the Federal judiciary of Missouri as to do so, the Supreme Court of the United States *would be out of harmony with all the other courts of the Anglo-Saxon world*. Not a *one single precedent case* has been *cited* by this defendant before the Federal Judiciary of Missouri, nor before the United States Supreme Court in this long period of Federal judiciary litigation (1935-1936) to justify the Missouri Federal judiciary to stop proceedings in a Missouri State court by Federal

court injunctions, court's final decree under which Marshall was ordered to secure from petitioner, *by force*, and *destroy defendant policy No. 8 611 895, the LAW* so it has been so far claimed by *Federal judiciary decisions*. Even in the well prepared thesis (Respondent's Brief and Supplemental Brief, but not learnedly so in petitioner's conviction) *is cited one single precedent case* to justify the Supreme Court of the United States to *find for this defendant*.

The Honored and learned John Adams wrote a thesis for the guidance of the *Continental Congress* in the drafting of our *American Constitution* (published at Boston and Philadelphia during session Continental Congress) and if the *Constitution* does not mention the John Adams thesis it nevertheless "*lurks by inference*" *in its every written word*. Your petitioner *interprets* the John Adams thesis that in the era preceding the fall of the *ancient Roman Empire*, the judicial branch of this ancient Republic (a democracy) sold it "down the river" into an Empire by court decisions, the Empire but to fall.

Your petitioner prays the Supreme Court of the United States will, if need be, "*get out of harmony with all the Courts of the Anglo-Saxon world*," but *remain in harmony with American Democracy and its Constitution* by over-ruling the lower Federal judiciary courts in Missouri in above enfitled cause and *find in favor of your petitioner*. Scant consideration should be given this defendant's warning to avoid a "*tangent*". History is proof the ancient Roman Empire heeded such a warning and look what happened there!

As your petitioner stated and pointed out on motion for rehearing granted by the Supreme Court of the United States, April 28th, 1941, pages #1-2-3, everything "genuine" has its "counterfeit". This defendant is a "counterfeit". The great danger of this defendant "counterfeit" is that he so skilfully impersonates the "genuine", so ex-

actly forges promises that seem like Christly blessings (page #1, last paragraph) offering them by quite another method and on *lower terms* that good people may be deceived who never for a moment could be deceived if the *mask* were not so lifelike, or if the *mask* were removed. Appellant Rickey, aided by *Missouri Courts*, removed the *mask* from this defendant (*The Rickey* v. *New York Life Corporation's* case, page #4, motion for rehearing) and your petitioner is here engaged, but before the Federal judiciary, to likewise remove the *mask* from this defendant "counterfeit" with policy No. 8 611 895 in above cause, with same identical disability policy clause as in the *Rickey* v. *New York Life Insurance Corporation's* case.

The John Adams thesis (page #7, foregoing brief) was the work of a "genuine".

Respondent's Brief, Respondent's Supplemental Brief as again analyzed here was the work of a "counterfeit" as it is intended as a thesis on Congress of 1793 first enacting Section 265, and with the full intent and purpose this defendant dares to claim, the defendant first admitting (voluntarily, of course) back in 1793 the States of the nation were acutely apprehensive that the Federal judiciary power would "rob" State citizens of *JUSTICE* assured under the Constitution.

QUOTATION ONE, page #1.

The Supreme Court is primarily interested in a question of *Judicial Policy* rather than the *JUSTICE* or *INJUSTICE* of above cause.

QUOTATION TWO, page #32.

Explains why remedy was not adequate by pleading decree of District Court at bar of State court suit.

QUOTATION THREE.

Pages #5-6-7-8-9 claims precedent case similar to above cause.

Page #3 above brief.

Rickey v. *New York Life* case.

QUOTATION THREE, pages 38-39-40.

Denies Federal court injunction was "abuse" stopping proceedings in State court.

What have Federal equity courts done?

What have all Anglo-Saxon courts done?

Congress in 1793 first enacted section 265, States feared Federal court power.

Admonishes United States Supreme Court not to proceed upon a tangent and thus get out of harmony with Anglo-Saxon courts of world.

The "genuine" and greatly Honored John Adams proved his thesis from history, and volunteered this vastly laborious work, and at great personal expense, to first start, then perpetuate American Democracy.

This "counterfeit" defendant, knowing full well the legal pitfalls in policy holder to ambiguous policy clauses; and knowing the colossal "pile of Gold" it reaps without return or rendering any obligation (1905 Missouri Court decision, 1937 decision by Supreme Court of Missouri, petitioner's Brief In Argument, pages #4 and #5) where it obtains support by LAW, left the State of Missouri because he was a "counterfeit" and *FEARED* Missouri Courts, but was and is harbored by the Federal judiciary of Missouri in above entitled cause.

The Supreme Court of the United States rendered decision December 3rd, 1934 "Yield to the Controlling Law and Judges of Virginia on insurance policy disability clause (page #39, Brief in Argument).

The Federal court, on December 3rd, 1936, wrote an opinion on foregoing said Supreme Court of the United States decision, pages #27-28, Brief In Argument. Before Federal court on motion for rehearing was signed affidavit how Federal court subpoenaed witness would testify if rehearing granted with knowledge on FRAUD on petition for suit in equity filed Missouri State court, October, 1935, charging

FRAUD. (Page #23, Brief In Argument; 14-15-16, writ of certiorari-amendment).

When entering Federal court temporary injunction stopping proceedings in Missouri State court Federal court wrote an opinion. (See page #26, Brief In Argument; but for written opinion in full, page #83, writ of certiorari).

Decision rendered by Federal court, November 23rd, 1936 (pages 13 to 31, Brief in argument), and foregoing written opinions by Federal court (pages #27-28 and page #26).

From the foregoing four paragraphs it is clear the Federal court had but one conviction. Disability clause in defendant policy No. 8 611 895 was *NOT AMBIGUOUS* and an urge to disagree with the Controlling Law of Missouri (Missouri State Established Law on disability) and to that end ruled decision rendered by the Supreme Court of the United States, December 3rd, 1934 (page #39, Brief in Argument, Federal court written opinion, pages #27-28) did not apply. But what consideration or mention did Federal court give to affidavit with motion for rehearing (denied) on this defendant's interference with Federal court subpoenaed witness during session of trial with knowledge on FRAUD? Absolutely none, nor is any mention made thereto in Federal court's written opinion (pages #27-28, Brief in Argument, subpoenaed witness interfered with, pages #14-15-16, petition for writ of certiorari-amendment).

Section 379, Title 28, U. S. C. A., Section 265, Judicial Code, was not even considered by Federal court during trial or in the rendering of decision; also when entering injunction stopping proceedings in Missouri State Court. It was surmounted by so called "legal technicalities"—"legal intricacies", but all contrary to evidence before trial, and contrary to Section 265 as well.

It is interesting to note decision rendered by the Supreme Court of the United States (*Mutual Life Insurance Company* v. *Johnson*, page #39 Brief In Argument) makes men-

tion of precedent case cited (Cf. *Klein* v. *New York Life Insurance Company*, 104 U. S. 88, 26 L. Ed. 662). Tersely, in this *Klein* v. *New York Life* case it had its beginning in year 1866. The premiums were punctually paid up to and including year 1871 when Klein, some thirty days before policy lapsed for non-payment of premium became mentally deranged. His wife was ignorant of the policy's existence or knowledge of policy terms. In a suit in equity filed by the wife the Circuit Court of the United States for Northern District of Illinois found for defendant (New York Life). On appeal to the Supreme Court of the United States the court said; quote in excerpt: Equity:

> "But in every such case the test by which to ascertain whether relief can or cannot be had in equity is to consider whether compensation can or cannot be made. In Rose *v.* Rose (Amb. 331, 332) Lord Hardwicke laid down the rule thus: "Equity will relieve against all penalties whatsoever, against non-payment for money at a day certain, against forfeiture of copyhold; but they are all cases where the court can do it with safety to the other party, for if the court cannot put him in as good condition as if the agreement had been performed (issue policy clause notification to defendant and payment premium) the court will not relieve."
>
> It was said in the New York Life *v.* Statham (supra) that "promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of premiums when due, but upon computing interest upon them. It is on this basis that they are enabled to offer insurance at the favorable rates they do. For failure for non-payment is a necessary means of protecting themselves from embarrassment. Delinquency cannot be tolerated or redeemed except at option of company. If the insured can neglect payment at maturity and yet suffer no loss or forfeiture, premiums will not be punctually paid. The Company must have some efficient

means of enforcing punctuality, etc. We are of the opinion that the decree of the Circuit Court is RIGHT and should be: Affirmed:

The Supreme Court of the United States on decision rendered December 3rd, 1934 (page #39 Brief in Argument), did not agree with this year 1866-1871 legal philosophy, and said, quote in excerpt:

> "When the disability of the insured occurred while the policy was in force, he was entitled to have the premiums waived until his death, for the disability continued until his death. He had paid for this right, and to say that he should lose the benefit of his policy because he failed, through mental and physical incapacity, to present proofs, would be harsh and unreasonable, under the circumstances".

The year 1866-1871 *Klein* v. *New York Life* case involved a straight life policy. As American Democracy rolled forward the Courts, and by decision, protected the life policyholder better than the petitioner's wife here, in fact legal complications on straight life policy was eliminated.

This same defendant in above cause influenced your petitioner to cancel off $70,000.00 straight life insurance in two different companies in three policies (page #23 petition for writ of certiorari-amendment) by FRAUD and buy in lieu thereof defendant policy No. 8 611 895 April 29th, 1924, and three additional defendant policies thereafter totaling $100,000.00. This defendant injected its *AMBIGUOUS* disability clause (accident and health) into its straight life policy which existed as a straight life policy back in 1866-1871. Defendant's *joint Life, health and accident policy, forced onto the trade, at least on to your petitioner*, and by *FRAUD*, carries all the *legal complications, legal court imbroglios, legal technicalities, legal intricacies known to the civilized world. Missouri courts, however, surmounted them all and by virtue of the Controlling Law of Missouri,*

known as Missouri's State Established Law on insurance policy disability clause it eliminated state court legal imbroglios and drove this defendant out of the state of Missouri with its form policy No. 8 611 895 in above cause.

In the 1866-1871 Supreme Court of the United States decision (page #10 foregoing brief) this same defendant there, as here in above cause cannot plead to this Court "All the calculations of the Insurance Company are based on the hypothesis of prompt payments. They not only calculate upon the receipt of the premiums when due, but upon compounding interest upon them" (Certified Record, petition for writ of certiorari, pages #68-69-70-71, Federal court rendered decision November 23rd, 1936, Exhibits #3 and #4, this defendant letters to petitioner, defendant making his own calculations and way in advance).

Yet this defendant, and by its representative, has advised its policyholder since an ignorant citizenry of State and nation adopted political philosophies beginning in 1932, due to its colossal reserves it met its policy 6% obligations on policyholder's money under terms of contract, obtaining only about 1% in the business world, but the people would get wise, repudiate an administration responsible and in meantime this defendant's policyholders had nothing to fear, etc."

It proves to be a somewhat different claim made to this Court, and by this defendant, back in 1866-1871 as against the period in America starting with year 1932.

This defendant (Page #36 Respondent's Brief, pages #5-6-7-8-9 Respondent's Supplemental Brief, quoted last paragraph page #2 foregoing) claims your petitioner, more than a year after the original *EQUITY ACTION* rightfully adjudicated by Federal Court on issue of *FRAUD*, enters Missouri State Court December 28th, 1937, (R. 22) to *DEFRAUD this defendant by LAW*, hence above entitled cause with defendant policy No. 8 611 895, but fails to men-

tion record of this defendant policy with its disability clause in defendant's effort over long period of years (*Rickey* v. *New York Life*, page #4 motion for rehearing granted April 28th, 1941) in Missouri, nor that Missouri Courts denied their pleas and said by Missouri Court decision (page #4 motion for rehearing granted April 28th, 1941) "*DEFENDANT'S CONTRADICTORY EVIDENCE MUST BE DISREGARDED, etc.*".

Nor has this defendant answered your petitioner to this Honorable High Court (page #49 petition for writ of certiorari-amendment, also first paragraph page #33 where Directorate requested petitioner to enter Missouri Court December 28th, 1937, (R. 22) page #16 motion for rehearing granted April 28th, 1941) nor made the slightest allusion two of its Directors, lifetime professional politicians, supported a United States Senate leadership group (pages #11-12-13 Brief In Argument) where an effort with national proportions aimed to tear down American Democracy from WITHIN. If American citizens of State and nation hold *disrespect* for the *LAW* American Democracy is "on the way out" as it did go out in ancient Rome. Put here, the same Senate leadership group, striving, ignorantly or otherwise, to destroy American Democracy from *WITHIN*, seek also since 1939 to destroy American Democracy from *WITHOUT*.

Your petitioner has observed Federal judiciary Rules and Regulations to put facts before this High Court in petition for writ of certiorari and amendment thereto, also in all subsequent Briefs, motions, etc.

The greatest proof this defendant's thesis on Section 265 is the work of a "counterfeit" here follows, viz:

In February, 1937, the President of the United States publicly charged to the nation and to the Congress, quote—

> "Delay in the administration of justice is the outstanding defect in our federal judiciary system. * * *

> It has exasperated the bench, the bar and the public. * * * The evil is a growing one * * * The business of the Courts is continually increasing * * * The time has come when further legislation is essential".

This defendant and its directorate, at least those among it lifetime professional politicians, (and the fact one was a lifetime Republican and the other a lifetime Democrat with diametrically opposite lifetime political philosophies) campaigned the nation to defeat the President of the United States proposed Federal judiciary bill; and with the aid of a group leadership in the United States Senate (comprised of Republicans and some publicly professed Democrats) did defeat the President of the United States Federal judiciary bill in the Senate.

Here in the above entitled cause with defendant policy Number 8 611 895 and its disability clause (a full and true record of its *AMBIGUITY* to be found within Missouri Court decisions) is proof what it is and has been all about.

For the Supreme Court of the United States to declare, and by the rendered High Court decision, the Federal judiciary of Missouri observed fully and were guided by Section 265, Judicial Code, first enacted by the Congress in 1793, in all opinions, decisions, court's final decree (destroy policy No. 8 611 895, the LAW) and the thesis prepared by this defendant in Respondent's Brief and Respondent's Supplemental Brief in support thereof is the work of a *MASTER* and a *MASTERPIECE*.

Your petitioner claims it to be the work of a "*counterfeit*" (pages #1-2-3 motion for rehearing granted by the Supreme Court of the United States April 28th, 1941) and also claims what the President of the United States publicly charged to the Nation and to the Congress of the Nation (February, 1937) to be correct, and that your petitioner has proven to this High Court it is here its plain

duty to surround the Federal courts of the Nation with such a highly Judicial rendered decision by this High Court for guidance no Federal court will again become misguided on the correct interpretation of Section 265 nor the intent of the Constitution of the United States. The above entitled cause is *PROOF* AND YOUR PETITIONER PRAYS FOR SUCH RESULT.

S. R. Toucey.

#131 West 61 Terrace,
Kansas City, Mo.

(6514)

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Supreme Court of the United States

No. [redacted] 16

SAMUEL R. TOUCEY, PETITIONER,

VS.

NEW YORK LIFE INSURANCE COMPANY, A CORPORATION, RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States

No. 587.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The original opinion in the Circuit Court of Appeals for the Eighth Circuit is reported in 102 F. 2d 16 Toucey applied for certiorari to this court. It was denied March 29, 1939 (307 U. S. 638). The first appeal was from a preliminary injunction; the second appeal was taken by Mr. Toucey from the final decree. The opinion of the Circuit Court of Appeals for the Eighth Circuit on that appeal is reported in 112 F. 2d 927. The gist of the Circuit Court of Appeals' second opinion is that no new issues were presented differing from those upon the first appeal and, therefore, the final decree below was affirmed upon the same grounds on which the preliminary injunction was affirmed.

Upon the first petition for a writ of certiorari, the cause was numbered 897 in this court.

SUMMARY OF THE ARGUMENT.

I.

Certiorari having been denied by this court from the decree of the circuit court of appeals upon the first appeal, and that court upon the second appeal having made the same ruling as it did before upon precisely the same grounds, and having found that the issues upon the second appeal were the same as those upon the first, there is no new ground presented to this court for certiorari and the petition should be denied.

II.

The application does not conform to Rule 38 of the Revised Rules of this court adopted February 13, 1938.

STATEMENT AND ARGUMENT.

I.

Certiorari having been denied by this court from the decree of the circuit court of appeals upon the first appeal, and that court upon the second appeal having made the same ruling as it did before upon precisely the same grounds, and having found that the issues upon the second appeal were the same as those upon the first, there is no new ground presented to this court for certiorari and the petition should be denied.

This case was carefully considered by the Circuit Court of Appeals for the Eighth Circuit and a full and able opinion written. See *Toucey* v. *New York Life Insurance Company*, 102 F. 2d 16. Competent counsel applied to this court for a writ of certiorari upon two grounds as this court will see by referring to the original petition (cause No. 897).

The first ground was: "Do the provisions of Section 379, Title 28, U. S. C. A., Section 265, Judicial Code, prohibit a federal court from staying proceedings in an action *in personam* pending in a state court?"

The second question presented in the petition was: "Does a court of equity, upon determining the equitable issues adversely to the petitioner, lose jurisdiction to adjudicate legal issues?"

Respondent's brief in opposition to the petition for certiorari met the first point raised with the following argument:

> Section 379, Title 28, U. S. C. A., Section 265, Judicial Code, does not prevent a federal district court from granting an injunction against proceedings in a state court where such injunction is neces-

> sary to protect and effectuate the pre-existing final decree of the district court rendered in equity and to prevent the relitigation of the issues settled by that decree.

Respondent's response to petitioner's second point was as follows:

> The decree of the district court in equity was a final and proper adjudication that Toucey was not totally and permanently disabled and that issue cannot be relitigated in the state court.

Petitioner's chief reliance under his first point was on *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 67 L. Ed. 226, 24 A. L. R. 1077, 43 S. Ct. 79. The Circuit Court of Appeals clearly distinguished that case, citing several decisions of this Court which we cited in respondent's brief in opposition to the petition for certiorari. This court, on the 29th day of March, 1939, denied the petition.

The final decree was issued by the District Court in favor of the New York Life Insurance Company, from which Mr. Toucey took a second appeal which was decided by the Circuit Court of Appeals on June 29, 1940. The motion for rehearing was denied July 22, 1940. In affirming the final decree below, this Court said in part (*Toucey* v. *New York Life Insurance Company*, 112 F. 2d 926, l. c. 928):

> There has been no change in the evidence in this case and no change in the controlling authorities since our previous decision. It is therefore apparent that the only possible basis for overruling that decision and for reversing the decree appealed from would be that the decision on the former appeal was clearly erroneous and that adherence to it would work a manifest injustice. We are convinced that the former decision of this court in this case was right, for the reasons therein stated. Compare *Hesselberg* v. *Aetna Life Ins. Co.*, 8 Cir., 102 F. 2d 23, 27.

The only part of petitioner's typewritten petition here which need be mentioned or which has any bearing is that part beginning on page 30 and ending at the bottom of page 33 and that part beginning on page 41 and ending on page 48. If the matter set forth on those pages be compared with petitioner's original petition and brief in cause No. 897, it will be found that the grounds and subject matter are substantially identical. If the Court will refer to respondent's brief in opposition to the original petition for writ of certiorari, it will find that these arguments were fully answered there.

The first 29 pages of the petition are a series of incoherencies and do not relate to anything in the record on appeal or to any possible ground for certiorari.

It is therefore submitted that this Court, having denied certiorari once, should not entertain application for it again upon identical grounds.

II.

The application does not conform to Rule 38 of the Revised Rules of this court adopted February 13, 1938.

Rule 38 of the Revised Rules of this Court provides, among other things, that a petition for a writ of certiorari shall contain a summary and short statement of the matter involved. It provides (paragraph 5) that the writ will only be granted "where there are special and important reasons therefor." The petitioner's purported petition does not contain a summary and short statement of the matter involved but is a long, verbose document containing innumerable, unfounded charges in no way relating either to anything contained in the printed record or to anything done or omitted by the Circuit Court of Appeals. There cannot be any "special and important reasons" in this case for the granting of the writ because the identical matter has already been decided by this Court on a previous petition and has been passed upon twice by the

District Court and twice by the Circuit Court of Appeals for the Eighth Circuit with the same result in every instance.

Some of the matter contained in the petition is not only unfounded in the record but is scandalous.

CONCLUSION.

For these reasons it is respectfully submitted that the petition should be denied.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 587.

SAMUEL R. TOUCEY, PETITIONER,

VS.

NEW YORK LIFE INSURANCE COMPANY,
A CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF.

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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 587.

SAMUEL R. TOUCEY, PETITIONER,

VS.

NEW YORK LIFE INSURANCE COMPANY, A CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF.

Petitioner has filed no brief on the merits. Respondent will therefore present the entire case.

OPINIONS BELOW.

This Court, on January 6, 1941, granted a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit to review the ruling of that Court (R. 79) in *Toucey* v. *New York Life Insurance Company*, 112 F. 2d 927, affirming the final decree in equity of the District Court for the Western District of Missouri ordering the issuance of a permanent injunction against further proceedings in a law action pending in the Circuit Court of Jackson County, Missouri, at Kansas City (R. 64-66). Toucey had previously appealed from the District Court's order granting a preliminary injunction and the Circuit

Court of Appeals had affirmed its issuance. *Toucey v. New York Life Insurance Company*, 102 F. 2d 16. Certiorari was applied for by Toucey's then counsel from the ruling of the Eighth Circuit on the first appeal upon the identical grounds on which the present application was made. This Court denied certiorari on March 29, 1939 (307 U. S. 638).

The gist of the Circuit Court of Appeals' second opinion (R. 79) is that Toucey's appeal from the final decree presented no new facts or issues differing from those presented upon the first appeal and, therefore, the final decree of the District Court was affirmed for the same reasons for which the issuance of the preliminary injunction had been affirmed.

STATEMENT OF THE CASE.

The controversy before this Court arose upon a supplemental bill in equity filed by respondent in the District Court to enforce a final decree in equity of the District Court rendered November 22, 1936 (R. 13, 43).

Original Case.

The original proceeding was a suit in equity brought by Toucey against respondent in the Circuit Court of Jackson County, Missouri, on October 26, 1935 (R. 26), in which he prayed the reinstatement of a policy of life insurance which the Company claimed had lapsed on October 2, 1934, for failure to pay the premiums. Toucey alleged (R. 14, 27 *et seq.*) that New York Life Insurance Company policy No. 8 611 895, issued to him in the face amount of $50,000, provided for the payment of disability benefits of $500 per month in the event of total and permanent disability, and for the waiver of all premiums falling due during such disability; that Toucey became totally and permanently disabled in April, 1933, and has ever since been so disabled; that Toucey did not know that his policy provided for total and permanent disability

benefits; that Toucey went to respondent and asked it to advise him what his policy did provide, and that respondent fraudulently concealed from Toucey the fact that his policy called for disability benefits, although it knew that he was then totally and permanently disabled (R. 31).

The bill further alleged that, pursuant to respondent's advice, Toucey surrendered certain of his other policies for cash, and surrendered policy No. 8 611 895 to respondent to be changed in amount by reducing all of the benefits thereunder by one-half (R. 29). He also alleged that he did not pay the quarterly premium due on the policy October 2, 1934 (R. 27, 30, 31), and that thereupon the policy was "unlawfully" cancelled by respondent. Thereafter, and in September, 1935, Toucey discovered for the first time that his policy provided for disability benefits for disability due to disease, and he thereupon applied for the reinstatement of the policy and for disability benefits (R. 30, 31), which respondent refused to grant because due proof of disability had not been submitted to it within six months after the lapse of the policy as required by the terms thereof (R. 30). The bill stated that, because of the foregoing facts, Toucey was entitled to have the attempted reduction of the amount of benefits under his policy set aside and to have the "attempted cancellation" of his policy adjudged of no force and effect and that he be further entitled *to have the premiums under the policy waived* from August 11, 1934 (the date on which he claimed to have written the Company a letter notifying it of his disability), and the policy reinstated for its full amount (R. 32). He also asked for $500 a month disability benefits from August 11, 1934, to the time of trial in November, 1936.

This suit was removed to the United States District Court for the Western District of Missouri on the ground of diversity of citizenship and an amount in controversy over $3,000 (R. 12).

Respondent's answer to this bill filed in the Federal court (R. 16, 33 *et seq.*) put in issue all of the claims

of the petition and expressly denied that Toucey was or had been totally and permanently disabled since April, 1933, or for more than three consecutive months from August 11, 1934, expressly denied that respondent had received any notice of any kind of such disability, and expressly denied that it unlawfully cancelled the policy; alleged the reduction of the face of the policy from $50,000 to $25,000 and the reduction of the disability benefits from $500 to $250 per month and alleged that the policy lapsed October 2, 1934, for failure to pay the quarterly premium then due; that Toucey paid no further premiums, took no steps to reinstate the policy, and that the policy has ever since been void; that Toucey was not entitled to a waiver of the premiums nor to reinstatement of the policy nor to any other disability benefits thereunder.

Toucey's reply (R. 41) was a mere repetition of part of his bill.

The case was tried on these pleadings and resulted in the decree of November 22, 1936 (R. 43), in which the District Court found that Toucey was not entitled to the relief prayed for and dismissed the bill with prejudice at his costs. The Court made findings of fact and conclusions of law and rendered an opinion (R. 44) at the time it dismissed the bill. No appeal was taken from this decree.

The court, in its opinion (R. 44), expressly found: *first*, that if respondent had intentionally misled Toucey into believing that his policy did not provide for total and permanent disability benefits, then Toucey would have been entitled to reinstatement of the $50,000 policy, provided Toucey was not in law conclusively presumed to know that the policy contained such a provision. The court found, however, that as a matter of law, Toucey was conclusively presumed to know that his policy contained this provision; *second*, that respondent did not mislead Toucey or conceal the disability provision from him but, on the contrary, told him the policy contained such a provision; *third*, that respondent did not by any

fraud induce Toucey to reduce his policy from $50,000 to $25,000; *fourth*, that under the evidence submitted to the court, Toucey was not and had not been totally disabled within the meaning of the policy.

SUBSEQUENT PROCEEDINGS.

Thereafter, on December 28, 1937, one James Shay commenced an action at law in the Circuit Court of Jackson County, Missouri, against respondent (R. 22), the petition in which (R. 53) alleged that he was a citizen and resident of the District of Columbia; that he was the assignee from Toucey of policy, No. 8 611 895 and Toucey's rights under it; that Toucey had performed all the terms of the policy on his part; and that Toucey had been totally disabled since April 1, 1933. He asked for judgment for disability benefits at the rate of $500 per month, or the total sum of $28,000, plus a "reasonable attorneys' fee" of $10,000 and a penalty of $2,800, for respondent's alleged vexatious refusal to pay his claim.

Thereafter, on March 10, 1938, pursuant to leave of the District Court duly granted (R. 13), respondent filed in the District Court for the Western District of Missouri, in Toucey's original equity suit, its verified supplemental bill in equity (R. 13), setting forth in detail all that had previously transpired in the case, including the decree rendered by the District Court on November 22, 1936, the Court's findings of fact and conclusions of law embodied in the decree and the filing of the action at law by Shay in the State court (R. 21-3, 43-4). It further alleged that the parties at the original trial in the District Court had offered testimony on the issue of Toucey's total and permanent disability, and that the Court considered that evidence, and found against Toucey (R. 21-2). It further alleged, in effect, that the assignment from Toucey to Shay, subsequent to the District Court's final decree, was a mere sham and pretext to avoid Federal jurisdiction; that Toucey was the real party

concerned; that the assignment was the result of a collusive and fraudulent plan between Toucey and Shay to nullify the District Court's final decree and to secure a new adjudication by the Missouri courts upon a matter which had already been fully adjudicated by the Federal court, and to inflict unjust and inequitable penalties upon respondent for a pretended vexatious refusal to pay the disability benefits alleged to be due (R. 23-4).

The supplemental bill prayed (R. 24-5) that Toucey and his attorneys be enjoined from bringing or prosecuting any suit in his own name or in the name of any other person for the purpose of securing a readjudication of the issues adjudged by the aforesaid decree and particularly, that he be enjoined from further prosecuting the above mentioned suit in the name of Shay pending in the State court. The Court will note that the attorneys who brought the suit in the name of Shay were not the same as those who brought the original equity suit for Toucey. The attorneys who brought the Shay suit represented Toucey in the proceedings in the federal court following the filing of respondent's supplemental bill.

A preliminary injunction, not shown in the Record, issued pursuant to the verified supplemental bill. See 102 F. 2d 16 and pp. 63 and 83 of petitioner's "Petition for Writ of Certiorari." Its issuance was affirmed by the Eighth Circuit on appeal by Toucey, in a full and thorough opinion by Judge Woodrough (102 F. 2d 16).

On that appeal, Toucey's counsel argued, *first*, that the question whether Toucey was totally and permanently disabled was not an equitable but a "legal issue" and that when the District Court found that Toucey was not entitled to equitable relief, it lost jurisdiction to determine this dependent "legal" issue; and, *second*, that the District Court was prohibited by Section 265, Judicial Code (Sec. 379, Title 28, U. S. C.), to stay the law action in the State court. On the first issue, the Eighth Circuit held that, inasmuch as Toucey's claim that the policy should be treated as still in force depended upon his being

totally and permanently disabled (since in that event the premiums he had failed to pay would have been waived by the terms of the policy), the fact of Toucey's total and permanent disability was an integral and essential part of his claim to *equitable relief* and that the District Court had jurisdiction to and did decide that issue adversely to Toucey. On the second issue, the Eighth Circuit held that this case was a proper one for the use of a supplemental bill to protect and enforce the original decree of the District Court and that it therefore came within one of the well recognized exceptions to Section 265 (see 102 F. 2d 22-23), citing many decisions of this and the lower federal courts.

Thereupon Toucey's counsel applied to this Court for certiorari (Cause No. 897) upon two grounds: *first*, "Do the provisions of Sec. 379, Tit. 28, U. S. C. A., Section 265, Judicial Code, prohibit a federal court from staying proceedings in an action *in personam* pending in a State court?" *second*, "Does a court of equity, upon determining the equitable issues adversely to the petitioner, lose jurisdiction to adjudicate legal issues?" This Court, on March 29, 1939, denied the application (307 U. S. 638). It may be said in passing that the second issue raised in Toucey's application really evades the question. It is not whether the District Court lost jurisdiction to adjudicate legal issues, but whether the issue of total and permanent disability adjudicated by that Court was, under the circumstances, a legal or an equitable issue. If the latter, the Court clearly had the power to decide it.

When the case came back to the District Court, Toucey filed an answer to the supplemental bill (R. 55) in which he denied that his assignment to Shay was colorable and a pretext to evade federal jurisdiction and made to defeat the adjudication of the federal court or was the result of a collusive plan between him and Shay and alleged that the final decree of November 22, 1936, was not "*res judicata* upon the legal issue of disability involved

in said suit now pending before the Circuit Court of Jackson County, Missouri."

On final hearing to make the injunction permanent, the only evidence offered was the "Stipulation Respecting Testimony of James Shay" (R. 60) introduced by respondent, the substance of which is as follows: Shay expressly stated that he was a resident of Washington, D. C., where he was engaged in "public relations" work; that he had been acquainted with M. W. Borders, Jr. (one of Toucey's attorneys), for six or seven years; that he had never met and was not acquainted with Samuel R. Toucey; that on December 10, 1937, he was requested by Borders to accept an assignment from Toucey on the policy in issue; that he had no information as to the character of the claim except such general facts as were imparted to him by Borders; that he accepted the assignment and employed Borders and Cornelius Roach to prosecute his claim; that in the event of a recovery, he would account for the proceeds to Mr. Toucey after deducting costs, expenses, and the fees of the attorneys; that he gave Toucey no cash or other thing of value for the assignment except such as the assignment shows.

Paragraph 12 of the stipulation is as follows (R. 61):

> I accepted the assignment of the cause of action as an accommodation to Mr. M. W. Borders, Jr., it being my understanding that the legal title to the cause of action being in my name and the suit being prosecuted in my name, and my being a resident of the District of Columbia, there would be no diversity of citizenship as between me and the New York Life Insurance Company within the meaning of the statutes relating to the removal of causes of action.

Shay stated that he made no agreement to pay the costs of the action (R. 61); that he did not advance the costs in the State court and did not supply the facts set forth in the petition in the State court suit; that he had no express agreement that he was to receive any fee; that he was obligated to turn over the proceeds of any re-

covery to Major Toucey after deducting the costs, expenses and fees of the attorneys. The actual assignment agreement (R. 62) provides that Shay, after deducting costs and expenses, will "hold the proceeds or amounts in trust for the use and benefit of the said Samuel R. Toucey."

Thereupon, the District Court issued its "Final Decree and Order for Permanent Injunction" (R. 64), pursuant to which a writ of injunction issued (R. 65) and was served on Toucey and his attorneys (R. 66).

Thereupon, Toucey's attorneys took a second appeal, in which the questions urged were identical with those presented on the first appeal (R. 69). The Eighth Circuit, by Judge Sanborn, ruled (*Toucey* v. *New York Life Insurance Company*, 112 F. 2d 927) that the record on the second appeal presented no new or different issues from those raised on the first appeal, saying (l. c. 928): "The final decree has the same basis in fact and law as the interlocutory decree which was considered on the former appeal" and that appellant's argument and brief "present the same grounds for reversal that were urged on the former appeal." The Court held, *first*, that the decision on the first appeal was binding in the absence of any change in the facts or issues; and *second*, that the Court was convinced its former decision was right, for the reasons therein stated.

From this decision Toucey, *pro se*, applied to this Court for certiorari in a petition of 87 printed pages, pursuant to which this Court granted certiorari on January 6, 1941 (61 S. Ct. 440). The grounds of his application are *identical* with those stated in the petition for certiorari following the first adverse decision by the Eighth Circuit in 102 F. 2d 16.

SUMMARY OF THE ARGUMENT.

I.

The original decree of the District Court on November 22, 1936, dismissing petitioner's bill in equity upon the merits was a proper adjudication that petitioner was not totally and permanently disabled and was *res judicata* of that issue. Hence, to enforce and protect the decree, it was appropriate for the District Court to enjoin any subsequent attempt to relitigate the same issue. Many prior decisions of this Court have established this equitable principle. To repudiate this principle or withhold its application in this case would result in unjust hardship to respondent.

II.

Section 265, Judicial Code (Section 379, Title 28, U. S. C., R. S., Sec. 720), does not, under the circumstances of the present case, prevent a federal court from staying proceedings in an action *in personam* pending in a state court. This case presents one of the uniformly recognized exceptions to the application of the statute, being an ancillary proceeding to effectuate and protect a final decree of a federal equity court in a controversy of which it had exclusive jurisdiction when the decree was rendered and to prevent relitigation of issues finally adjudged by that decree. The purpose of the statute is, not to render a federal court powerless to carry out its decrees, but merely to prevent an unseemly conflict between the federal and state jurisdictions in cases where the prior exclusive jurisdiction of the federal court has not been clearly established in accordance with recognized principles of law and equity. The doctrine of *Kline* v. *Burke Construction Co.*, 260 U. S. 226, does not apply to this case.

III.

Section 265, Judicial Code, should not be construed to prohibit the relief granted in this case. To so construe it would raise grave doubts respecting the constitutionality of the statute in view of the express provision of Section 2 of Article III of the Constitution of the United States, that "the judicial power shall extend to all cases, in law and equity, arising under this Constitution and the laws of the United States: * * *." The power of a federal equity court to enforce and protect its own decrees is inherent in its nature as a court and is derived from Section 2 of Article III of the Constitution. The constitutionality of any attempt by Congress to restrict or abolish that power is open to serious doubts. A construction of Section 265 raising such doubts must be avoided.

ARGUMENT.

Respondent is handicapped by the absence of a brief on the merits on behalf of petitioner. The ground on which this court granted his petition is rendered somewhat uncertain by the circumstance that his application for certiorari after the first appeal was denied, and that the petition now before this court, contains a great number of charges in the language of a layman the importance of which, in the view of this court, respondent is not in a position to judge. Since, however, the petition does contain two clearly expressed grounds, copied from the first petition which this court denied, respondent is perforce proceeding upon the assumption that the petition was granted upon the suggestion of a doubt of the correctness of this court's previous ruling. We shall, therefore, in this brief confine ourselves to the points relied upon by petitioner, copied from his first petition.

Respondent has assumed that this court is not concerned with various charges of wrongdoing against respondent's employees contained in the petition, none of which finds any basis whatever in the record (nor in fact) nor was or ever has been assigned as error in the District Court or the Circuit Court of Appeals.

Respondent has also assumed that this court is not interested in the effect of the decree insofar as it stops *Shay* from prosecuting the state court action through an injunction against *Toucey*. Shay's stipulation, mentioned in the Statement of the Case (R. 60), thoroughly identifies Shay with Toucey and shows that the assignment from Toucey to Shay was a mere device by means of which Toucey hoped to relitigate his controversy in the state court. The statute defining the scope of federal injunctions is obviously broad enough to include this situation (Sec. 383, Title 28, U. S. C.). Pe-

titioner and his counsel have never claimed otherwise and assigned no error on this score in the Circuit Court of Appeals or this Court.

Respondent has also assumed that this Court is not concerned with the ruling of the Eighth Circuit that its decision on the first appeal (102 F. 2d 16) constituted the "law of the case," in the absence of new facts, new authorities or different issues. Obviously, that ruling was right. A decision on an appeal from a preliminary injunction constitutes the "law of the case" equally with any decision on any other appeal. *Thompson* v. *Marshall, etc., Co.*, 168 U. S. 451; *Radio Corp.* v. *De Forest Radio Co.*, 3 Cir., 47 F. 2d 606; *Walbridge-Aldinger Co.* v. *Rudd*, 8 Cir., 26 F. 2d 636; *Brown* v. *Lanyon Zinc Co.*, 8 Cir., 179 F. 309; *International Brotherhood* v. *Western Union Telegraph Co.*, 7 Cir., 46 F. 2d 736. Moreover, the Eighth Circuit reconsidered the merits of the first appeal and concluded (l. c. 928) (R. 80), "We are convinced that the former decision of this court in this case was right, for the reasons therein stated." In any event, this ruling is not presented by Toucey as a ground for review by this Court.

I.

The Original Decree of the District Court on November 22, 1936, Dismissing Petitioner's Bill in Equity upon the Merits Constituted an Adjudication That Petitioner Was Not Totally and Permanently Disabled and Was Res Judicata of That Issue. Hence, to Enforce and Protect the Decree It Was Appropriate to Enjoin Any Subsequent Attempt to Relitigate the Same Issue.

The identity of issues in Toucey's original equity suit and the Shay action is so apparent that we feel sure that this point was not uppermost in this Court's mind in granting certiorari. Consequently, we shall consider it very briefly. If this Court will examine Toucey's bill in the original case (R. 1) and respondent's answer

thereto (R. 33), it will be apparent that Toucey never claimed that he had paid any premium on the policy of insurance in controversy subsequent to August 2, 1934. To claim that he was entitled to have the policy reinstated and declared in force as of October 2, 1934, and subsequently, he depended and necessarily had to depend *solely* upon the fact that he was totally and permanently disabled. If so, and if due proof of his disability were submitted to respondent, the premiums thereafter falling due were waived. Hence, even if Toucey had succeeded in proving the fraud alleged in his bill, it would have been necessary for him to prove *also*, as an essential part of his equitable claim to reinstatement, that he was totally disabled prior to October 2, 1934. Thus, the issue of Toucey's total and permanent disability was an equitable issue and an essential fact to establish his claim for equitable relief. The District Court found against him on this fact. It entered a final decree dismissing his case on the merits (R. 43) and accompanied this decree with an opinion (R. 44), in which were embodied its findings of fact and conclusions of law. Finding of Fact No. 2 (R. 49) was:

> I believe that it has not been proved that the plaintiff, within the meaning of this contract, is now, or has been at the times alleged in the petition, wholly disabled by bodily injury or disease, so that he is prevented thereby from engaging in any occupation whatever for remuneration or profit and I think the fact to be that he is not and has not been so disabled. That is finding of fact, I think, No. 2.

To prove his right to a premium waiver and reinstatement, Toucey had to prove fraud *and* his total and permanent disability. The District Court first found that respondent had committed no fraud (R. 47). The Court could have stopped there but it did not. It also found that Toucey was not totally disabled. Thus, it expressly found against Toucey on both essential facts of his claim for equitable relief, even though the finding against him on either would have been enough to deny the relief

claimed. Where there are two grounds, upon either of which a court may rest its decision, and it adopts both, each is the judgment of the court and of equal validity with the other. *United States* v. *Title Insurance & Trust Co.*, 265 U. S. 472; *Union Pacific R. R. Co.* v. *Mason City, etc., R. R. Co.*, 199 U. S. 160; *Railroad Companies* v. *Schutte*, 103 U. S. 118; *Irving Nat'l Bank* v. *Law*, 2 Cir., 10 F. 2d 721.

The reasoning of the Eighth Circuit on this point is unanswerable. Judge Woodrough said, in 102 F. 2d, at page 20:

> His petition to the equity court was to reinstate the whole original policy with all of its life insurance and other benefits. The grounds without which he could not have stated a case for reformation and reinstatement of his policy were the alleged total and permanent disability occurring in April, 1933, exempting him from premium payments after that date, and the alleged fraud of the insurance company.
>
> Insofar as Mr. Toucey's prayer for recovery for his disability payments may be regarded as a dependent legal claim, it was a claim dependent upon Mr. Toucey's establishing his right to reinstatement of his entire policy. That right, in turn, was dependent upon proving the disability occasioning premium waiver and also upon the alleged fraud of the insurance company in respect to said disability. Unless and until the equity court had before it evidence to justify it in finding both the disability and the fraud relating thereto, it could not award judgment on the disability provisions of the policy. But both of those claims were asserted and in controversy before it and the court of equity was called upon to decide upon both controversies. It did consider the evidence on both issues and we are cited to no case implying that a court of equity lacks power to fully and finally adjudicate all equitable controversies presented by the

pleadings and the evidence in a case within its jurisdiction. Its adjudication on each claim in controversy was equally conclusive and binding upon Mr. Toucey.

Even if the District Court had not expressly found that Toucey was not totally and permanently disabled, that issue was conclusively adjudicated adversely to him by the decree dismissing his bill. That decree of dismissal on the merits rendered all the issues in the case *res judicata*. *Hickey* v. *Johnson*, 8 Cir., 9 F. 2d 498, l. c. 501; *Manhattan Trust Co.* v. *Trust Co. of North America*, 8 Cir., 107 Fed. 328; *Brooks* v. *Arkansas-Louisiana Pipe Line Co.*, 8 Cir., 77 F. 2d 965. That decree is conclusive of every issue necessary to sustain it, whether that issue is mentioned or not (*Fayerweather* v. *Ritch*, 195 U. S. 276; *St. Joseph Union Depot Co.* v. *Chicago, R. I. & P. Ry. Co.*, 8 Cir., 89 Fed. 648, l. c. 659; *Board of Commissioners* v. *Cockrell*, 5 Cir., 91 F. 2d 412, l. c. 416; *Pick Mfg. Co.* v. *General Motors Corp.*, 7 Cir., 80 F. 2d 639).

Petitioner and his counsel have never contended that Shay's state court action was not an attempt to relitigate the question of Toucey's total and permanent disability. It obviously is, because Shay could not collect the disability benefits for which he asks unless Toucey were proven to be totally and permanently disabled. Petitioner and his counsel have merely contended that the District Court had no power to decide the question of Toucey's total and permanent disability because that was a "legal" issue, which the court lost jurisdiction to determine after having found against Toucey on his claim of fraud. We have demonstrated that this issue was an equitable one.

We shall now show that it was within the power of the District Court as an equity court to prevent Toucey through Shay from relitigating that issue in the state court and shall show under Point II that Section 265 of the Judicial Code does not prohibit the District Court from doing so.

The Action of the District Court in Enjoining the Prosecution of the State Court Action, Pursuant to Respondent's Supplemental Bill, Was Proper and in Accordance with the Well-recognized Power of Federal Courts of Equity to Effectuate and Perfect Their Own Final Decrees.

A. The Remedy by Supplemental Bill Is of Ancient Origin.

The use of the writ of injunction to prevent a party from pursuing a remedy at law is centuries old. According to Mr. Story, it can be traced to the beginning of the reign of Henry VII (Story's Eq. Jur., Chap. 23, Sec. 874). An interesting treatise on the use of injunctions to stay proceedings at law is Mr. Eden's "Treatise on the Law of Injunctions" (2d American, from the last London Ed., N. Y., 1839). He states that the granting of injunctions without a bill previously filed was one of the articles of impeachment against Cardinal Wolsey (Ch. 3, p. 70). Injunctions were issued (always against the parties) to stay a trial or, after verdict, to stay judgment or, after judgment, to stay execution or, if the execution had been effected, to stay the money in the hands of the sheriff (Story, Sec. 874, *supra*). Injunctions were issued in the case of mutual mistake, fraud, where discovery was called for, to relieve a party against penalties, to prevent forfeitures for nonpayment of rent or for breach of covenant, to secure specific performance, in aid of an accounting, and in numerous other cases.

One of the earliest, commonest and most uniformly recognized grounds for injunction is to execute or enforce a prior decree of a court of equity, upon application by supplemental bill. In *Kershaw* v. *Thompson*, 4 Johns. Ch. 609 (1820), Chancellor Kent held that after a decree of foreclosure of a mortgage, the Court, in aid of its decree, would, upon the application of the purchaser of the

property, order the mortgagor or his successor in interest to surrender possession of the land. He said, l. c. 612:

> The distribution of power between the Courts would be injudicious, and the administration of justice exceedingly defective, and chargeable with much useless delay and expense, if it were necessary to resort, in the first instance, to a Court of equity, and, afterward, to a Court of law, to obtain a perfect foreclosure of a mortgage. It seems to be absurd to require the assistance of two distinct and separate jurisdictions for one and the same remedy, viz.: the foreclosure and possession of the forfeited pledge. But this does not, upon due examination, appear to be the case; and it may be safely laid down as a general rule that the power to apply the remedy is coextensive with the jurisdiction over the subject matter.

The learned Chancellor relied upon the earlier case of *Dove* v. *Dove* (Dickens 617, 1 Bro. 375, 1 Cox 101, S. C.), which he states was before Lord Loughborough and also before the Lords Commissioners in 1783 and 1784. There, the Court decreed the sale of the estate of a testator but did not decree that the defendant deliver up possession. The tenant in possession, who held under some supposed right of jointure and dower, refused to deliver. The purchaser applied to the Court for a writ of assistance, which was issued, to put the purchaser in possession. It was shown that there was a well established practice at that time to procure a decree on the defendant to deliver possession, make a demand, and an attachment would then issue for disobeying the order, followed by an injunction against the tenant to deliver possession and, upon a refusal, a writ of assistance to the sheriff to put the party in possession issued on motion without notice. Chancellor Kent points out that the same rule is stated in West's Symbol, Part 2, 189, to have been the practice in the reign of Queen Elizabeth and that the same procedure under a decree for possession of land is prescribed by Lord Bacon in his Rule No. 9.

Mr. Story says, Section 1291:

> Sec. 1291. *Injunctions as Aid to Enforcement of Judgment for Recovery of Land.*—Courts of equity also interfere and effectuate their own decrees in many cases by injunctions in the nature of a judicial writ or execution for possession of the property in controversy; as, for example, by injunctions to yield up, deliver, quiet, or continue the possession, followed up by a writ of assistance. Injunctions of this sort are older than the time of Lord Bacon, since in his Ordinances they are treated as a well known process. Indeed, they have been distinctly traced back to the reign of Elizabeth and Edward VI, and even of Henry VIII. In some respects they bear an analogy to sequestrations; but the latter process, at least since the reign of James I, has been applied not merely to the lands in controversy in the cause but also to other lands of the party.

relying on *Kershaw* v. *Thompson*, *supra*, and *Dove* v. *Dove*, *supra*, for his authority; also, on Eden on Injunctions, *supra*. He also quotes from Chancellor Kent (4 Kent Comm. Lect. 58, pp. 191-192, 3d Ed.) as follows:

> Upon a decree for a sale (of mortgaged property) it is usual to insert a direction that the mortgagor deliver up possession to the purchaser. But whether it be or be not a part of the decree, a Court of equity has competent power to require by injunction and enforce by process of execution delivery of possession; and the power is founded upon the simple elementary principle that the power of the Court to apply the remedy is co-extensive with its jurisdiction over the subject matter.

See also *Schenck* v. *Conover*, 13 N. J. Eq. (2 Beasley) 220 (1860), in which the Court pointed out that injunctions to deliver possession of lands after decree went back to the time of Henry VIII, citing numerous early authorities.

The remedy by supplemental bill has not, however, been confined to actions involving the possession of real

estate or other property. See *Shepherd* v. *Towgood*, Tur. & Rus. 379 (Sir Thomas Plumer, Master of the Rolls) (1823), in which a supplemental bill was permitted to be filed following an original creditor's bill. See *Davis* v. *Bluck*, 6 Beav. 393 (1843), where the suit was for specific performance of a contract to assign a lease and, upon discovery that the premises involved were more extensive than as described in the contract, the Court permitted the filing of a supplemental bill to cover the additional property.

In *Buffum's Case*, 13 N. H. 14 (1842), the situation was the same as in *Kershaw* v. *Thompson*, *supra*, and *Schenck* v. *Conover*, *supra*, and the Court said, l. c. 16:

> The Court has the power to issue all process necessary to carry its decree into effectual execution. Hopkins Ch. Rep. 231; *Ludlow* v. *Lansing*, 4 Johns. Ch. 613.

Ludlow v. *Lansing*, 4 Johns. Ch. 613 (1824) (N. Y.) was similar to and followed the decision in the case of *Kershaw* v. *Thompson*, *supra*. There, Chancellor Sanford said, speaking of supplemental proceedings in equity to put a party in possession of real estate:

> This practice is not an extension of the jurisdiction of this Court; it is merely an exertion of its acknowledged powers, in a particular manner; a species of relief by way of execution. Where this Court has power to decree, it has power to carry its decrees into effectual execution; and there cannot be any good reason that the purchaser of mortgaged lands sold under a decree in equity should not be put into possession by the Court which makes the sale and transfers the title. To transfer the title and leave the purchaser to another suit to obtain possession from a party, whose rights had been fully decided by this Court, would be useless, and vexatious circuity.

B. This Court has repeatedly held that where a federal court has issued a final decree in equity and where one of the parties or one in privity with him attempts or threatens a course of action which will nullify the decree or lessen or impair its effect, the federal court will, upon the filing of a supplemental bill, enjoin the party or those in privity with him from doing so.

A leading case in this Court is *Root* v. *Woolworth*, 150 U. S. 401 (1893), in which the federal court for the District of Nebraska had decreed the title to certain real estate to be in one Morton. Subsequently, the title passed from Morton to Woolworth who, upon Root's reentry on the premises and claim of title previously declared to have been in Morton, filed an ancillary bill in the same court seeking, among other things, that Root be restrained from asserting his pretended title, and occupying the premises, and that a writ of possession be issued to remove Root from the premises. Upon the question whether or not the court had jurisdiction to entertain the bill, this Court said, l. c. 410-11:

> It is well settled that a court of equity has jurisdiction to carry into effect its own orders, decrees, and judgments, which remain unreversed, when the subject-matter and the parties are the same in both proceedings. The general rule upon the subject is thus stated in Story's Equity Pleading (9th Ed.), Sec. 338:
>
> > "A supplemental bill may also be filed, as well after as before a decree; and the bill, if after a decree, may be * * * in aid of the decree, that it may be carried fully into execution; * * * *But where a supplemental bill is brought in aid of a decree, it is merely to carry out and to give fuller effect to that decree*, and not to obtain relief of a different kind on a different principle; the latter being the province of a supplementary bill in the nature of a bill of review, which cannot be filed without the leave of the court."
>
> * * * * * *

> *The jurisdiction of courts of equity to interfere and effectuate their own decrees by injunctions or writs of assistance in order to avoid the relitigation of questions once settled between the same parties is well settled.* Story's Eq. Jur., Sec. 959; *Kershaw* v. *Thompson*, 4 Johns. Ch. 609, 612; *Schenck* v. *Conover*, 13 N. J. Eq. (2 Beasley) 220; *Buffum's case*, 13 N. H. 14; *Shepherd* v. *Towgood*, Tur. & Rus. 379; *Davis* v. *Bluck*, 6 Beav. 393 (italics ours).

The case not only establishes the principle of equitable jurisdiction that a federal equity court is empowered to protect by injunction its own decrees against subsequent relitigation, but expressly extends the scope of that protection not only against the party against whom the decree was rendered but against anyone claiming under or through such person. There the supplemental bill was brought by the assignee of the person in whom the title had been decreed to be. The court said, l. c. 411:

> Under this principle Morton could undoubtedly have brought the bill to carry into effect the decree rendered in his favor against Root, *and it is equally clear that his assignee, or privy in estate, has a right to the same relief that Morton could have asserted.* On this subject it is stated in Story's Equity Pleading, Sec. 429:
>
> > "Sometimes such a bill is exhibited by a person who was not a party, or who does not claim under any party to the original decree; but who claims in a similar interest, or who is unable to entertain the determination of his own rights, till the decree is carried into execution. *Or it may be brought by or against any person claiming as assignee of a party to the decree.*"
>
> The appellee in the present case occupies that position, and he should not, any more than Morton, to whose rights he has succeeded, be put to the necessity of instituting an original or independent suit against Root, and relitigate the same questions which were involved in the former proceeding (first italics ours).

The opinion in the Root case nowhere mentions Section 265, but completely ignores it. The decision is not upon the ground that the court had the custody of a *res* but on general principles of equity jurisdiction.

An excellent case, very much in point, is *Julian* v. *Central Trust Co.*, 193 U. S. 93 (1904). There, a foreclosure proceeding was instituted in the Federal court under a mortgage on a railroad. The Court decreed and confirmed the sale of the property. Afterward, certain creditors of the company formerly owning the railroad obtained judgments against it in the North Carolina State court and sought to levy upon and sell the property described in the decree of foreclosure and the order confirming the sale. Thereupon, the purchaser at the foreclosure sale filed a supplemental bill in equity to restrain the judgment creditors from satisfying their demands out of the property. In holding that the Circuit Court was right in enjoining the plaintiff in the State court cases from proceeding on their judgment, this Court said, l. c. 112-13:

> In such cases where the Federal court acts in aid of its own jurisdiction and to render its decree effectual, it may, notwithstanding Sec. 720, Rev. Stat., restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction. *Sharon* v. *Terry*, 36 Fed. Rep. 337, *per* Mr. Justice Field; *French* v. *Hay*, 22 Wall. 250; *Deitzsch* v. *Huidekoper*, 103 U. S. 494.
>
> Nor is it an answer to say that these judgments were for causes of action arising subsequent to the confirmation of sale. The Federal Court by its decree reserved the right to determine what liens or claims should be charged upon the title conveyed by the court, and by the levy and sale to pay these judgments the title is charged with other liens established in another court in a proceeding to which the purchaser was not a party. The Federal court, in protecting the purchaser under such circumstances, was acting in pursuance of the jurisdiction acquired when the foreclosure proceedings were begun.

See also *Riverdale Cotton Mills* v. *Ala. & Ga. Mfg. Co.*, 198 U. S. 188 (1905), where on comparable facts, a decree of injunction was affirmed by this Court, which said, l. c. 194-5:

> It thus appears that a party carries on a litigation in a Federal court on its merits, and when beaten in that court goes into a state court and claims that, by reason of his own untruthful admission of citizenship, the Federal court assumed a jurisdiction which in fact it could not take, and that all the proceedings in that court must go for naught. Under such circumstances there can be no doubt that the Federal court may inquire and determine whether its proceedings were a nullity, and such inquiry is not an original proceeding, but ancillary to those which have already been had. In other words, a Federal court, exercising a jurisdiction apparently belonging to it, may thereafter, by ancillary suit, inquire whether that jurisdiction in fact existed. It may protect the title which it has decreed as against every one a party to the original suit and prevent that party from relitigating the questions of right which have already been determined. *French, Trustee*, v. *Hay*, 22 Wall. 250; *Cole* v. *Cunningham*, 133 U. S. 107; *Root* v. *Woolworth*, 150 U. S. 401.

In addition to *French, Trustee*, v. *Hay*, 22 Wall. 250, and *Root* v. *Woolworth*, *supra*, the Court relied on *Julian* v. *Central Trust Co*, *supra*. The language in this case (by Mr. Justice Brewer) is quite apropos to the present controversy.

In *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273 (1906), the federal District Court for South Carolina had adjudged in 1870 that plaintiff was exempt from certain taxes imposed by South Carolina law. Thirty years later, in 1900, the legislature assessed plaintiff's property for taxes for twelve years back and directed the Attorney General to test by suit in the state court plaintiff's right to exemption from these taxes. Thereupon the Coast Line filed its ancillary bill in the original case, al-

leging that the assessment and suit were in direct violation of the decree of 1870 and asking that the Attorney General be enjoined from further prosecuting the State court suit. A permanent injunction was ordered, which this Court approved, holding that the State of South Carolina and its Attorney General were bound by the 1870 decree which had established the exemption in issue in the pending State court suit. This Court said, l. c. 292:

> Indeed, the proposition that * * * section 720 of the Revised Statutes, control a court of the United States in administering relief, although the court was acting in a matter ancillary to a decree rendered in a cause over which it had jurisdiction, is not open for discussion. *Dietzsch* v. *Huidekoper*, 103 U. S. 494; *Prout* v. *Starr*, 188 U. S. 537; *Julian* v. *Central Trust Co.*, 193 U. S. 93, 112.
>
> And this reasoning disposes of the contention that the court below erred in enforcing its prior decree because there was adequate remedy at law, by interposing a defense in the state courts to the actions brought by the Attorney General. That question was foreclosed by the decree in the Pegues case. * * * Having acquired by that decree a right which the petitioner was entitled to enforce, * * * that rule could not rightly be invoked to deprove the court below as a court of equity of the power to protect the petitioner in the enjoyment of rights previously secured under a decree of the court.

In *Looney* v. *Eastern Texas R. R. Co.*, 247 U. S. 214 (1918), the Railroad Commission of Louisiana filed with the Interstate Commerce Commission a complaint charging that various railroad companies were maintaining unreasonable and discriminatory rates on traffic from Louisiana to Texas. The order of the Commission, pursuant to the proceeding, was sustained by this Court (234 U. S. 342). Subsequently, the Commission issued an order that rates between the points in question should be no greater than those between points in Texas. The Attorney General of Texas declared that the order was void and that he would institute suits in Texas for damages and penalties

under Texas law against any carrier complying, whereupon the carriers filed a bill in equity in the Federal District Court in Texas to enjoin the Attorney General from bringing the suits. The three-judge court issued the order prayed. The Attorney General nevertheless proceeded to file a suit in the Texas court. The carriers then filed a supplemental bill in the Federal court, setting out certain proceedings of the Interstate Commerce Commission which had occurred subsequent to the original bill and setting out the suit filed by the Attorney General, and asking that its prosecution be enjoined. A temporary injunction was issued, from which the Attorney General appealed to this Court, where a motion was filed to dismiss the appeal for want of jurisdiction on the ground that the injunction was not an appealable order under Section 266, Judicial Code. This Court sustained the motion to dismiss but said, l. c. 221:

> The use of the writ of injunction, by federal courts first acquiring jurisdiction over the parties or the subjectmatter of a suit, for the purpose of protecting and preserving that jurisdiction until the object of the suit is accomplished and complete justice done between the parties, is familiar and long established practice, *Freeman* v. *Howe*, 24 How. 450; *Harkrader* v. *Wadley*, 172 U. S. 148, 163, 164; in a rate case, *Missouri* v. *Chicago, Burlington & Quincy R. R. Co.*, 241 U. S. 533, 543. So important is it that unseemly conflict of authority between state and federal courts should be avoided by maintaining the jurisdiction of each free from the encroachments of the other, that Section 265 of the Judicial Code, Rev. Stats., Sec. 720, Act of March 2, 1793, Ch. 22, 1 Stat. 334, has repeatedly been held not applicable to such an injunction. *Julian* v. *Central Trust Co.*, 193 U. S. 93, 113; *Simon* v. *Southern Ry. Co.*, 236 U. S. 115.

In *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U. S. 356 (1921), plaintiff, a fraternal benefit association, filed a supplemental bill to have enjoined a State court action alleged to be an effort to relitigate the question of plaintiff's use of certain trust funds and of the validity of its

own reorganization plan by which another class of certificate holders had been created, both questions having been determined adversely to defendants in a prior federal court equity suit. The issues in the original federal equity suit and in the subsequent State court case were identical. *The case is squarely in point here.* This Court held that defendants were bound by the prior decree and that an injunction should have been issued upon the ancillary bill, saying, l. c. 367:

> * * * holding, as we do, that the membership of Class A were concluded by the decree of the District Court, an ancillary bill may be prosecuted from the same court to protect the rights secured to all in the class by the decree rendered. *Looney* v. *Eastern Texas R. R. Co.*, 247 U. S. 214, and cases cited.

In *Independent Coal & Coke Co.* v. *United States*, 274 U. S. 640 (1927), the United States, in whom title to certain real estate in the State of Utah had been decreed to be, was permitted to maintain an ancillary bill to restrain a transferee of the losing party from asserting a title adverse to that adjudged by the decree. The Court said, l. c. 647:

> The suit is in the nature of a supplemental bill in aid of the former decree and is an appropriate method of securing the benefit of the first decree when subsequent events have made necessary some further relief in order that the plaintiff may enjoy the full fruits of the victory in the first suit. Cf. *Root* v. *Woolworth*, 150 U. S. 401; *Shields* v. *Thomas*, 18 How. 253, 262; *Thompson* v. *Maxwell*, 95 U. S. 391; *Story, Equity Pleading*, 10th Ed., Secs. 338, 339, 345, 351 (b), 353, 429, 432. Cooper, Equity Pleading, 74, 75.

There no action had been begun in the state court and the case, therefore, does not involve the construction of Sec. 265.

In *Local Loan Co.* v. *Hunt*, 292 U. S. 234 (1934) Hunt was adjudged a bankrupt and was discharged from

all provable debts and claims. One week later, petitioner brought an action in the municipal court of Chicago against Hunt's employer to enforce an assignment of wages made prior to the filing of his petition in bankruptcy to secure a debt of $300. Thereupon Hunt commenced this proceeding in the original bankruptcy action by a supplemental bill to enjoin petitioner from further prosecuting the action in the Chicago court or from otherwise attempting to enforce the wage assignment. The District Court entered a decree accordingly, which was affirmed on appeal. On certiorari, this Court also affirmed the decree, pointing out that the bill was supplemental and for the purpose of effectuating and protecting the original bankruptcy decree, saying, l. c. 239:

> *First.* The pleading by which respondent invoked the jurisdiction of the bankruptcy court in the present case is in substance and effect a supplemental and ancillary bill in equity, in aid of and to effectuate the adjudication and order made by the same court. *That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well settled. Root* v. *Woolworth,* 150 U. S. 401, 410-412; *Julian* v. *Central Trust Co.,* 193 U. S. 93, 112-114; *Riverdale Mills* v. *Manufacturing Co.,* 198 U. S. 188, 194 *et seq.; Freeman* v. *Howe,* 24 How. 450, 460. And this, irrespective of whether the court would have jurisdiction if the proceeding were an original one. The proceeding being ancillary and dependent, the jurisdiction of the court follows that of the original cause, and may be maintained without regard to the citizenship of the parties or the amount involved, and notwithstanding the provisions of Section 265 of the Judicial Code * * *. *Julian* v. *Central Trust Co., supra,* 112; *Dietzsch* v. *Huidekoper,* 103 U. S. 494, 497; *Root* v. *Woolworth, supra,* 413; *M'Donald* v. *Seligman,* 81 Fed. 753; *St. Louis, I. M. & S. Ry. Co.* v. *Bellamy,* 211 Fed. 172, 175-177; *Brun* v. *Mann,* 151 Fed. 145, 150 (Italics ours).

and further saying, l. c. 240:

> "Petitioner relies upon a number of decisions where other federal courts sitting in bankruptcy have declined to entertain suits similar in character to the present one, on the ground that the effect of a discharge in bankruptcy is a matter to be determined by any court in which the discharge may be pleaded. See, for example, *Hellman* v. *Goldstone*, 161 Fed. 913; *In re Marshall Paper Co.*, 102 Fed. 872, 874; *In re Weisberg*, 253 Fed. 833, 835; *In re Havens*, 272 Fed. 975. *To the extent that these cases conflict with the view just expressed they are clearly not in harmony with the general rule in equity announced by this court.* And we find nothing, either in the nature of the bankruptcy court or in the terms of the bankruptcy act, which necessitates the application of what would amount to a special rule on this subject in respect of bankruptcy proceedings (italics ours).

The latest expression of this Court approving and applying this principle is *Dugas* v. *American Surety Co.*, 300 U. S. 414 (1937). There The Lumbermen's Reciprocal Association, a Texas company, executed a surety bond for $20,000 to qualify to write Workmen's Compensation and other insurance in Louisiana. It failed and, the amount of the claims against it being in excess of the amount of the bond, the surety, American Surety Company, paid the amount of the bond into the Federal District Court in Louisiana under the Federal Interpleader Act and secured a decree discharging it from further liability. Shortly before the surety company did so, one Dugas sued American Surety Company as surety in a Louisiana court upon the bond and secured a judgment for three hundred weeks' compensation at $20 per week. American Surety Company appealed and, as required by state law, posted an appeal bond of $10,000 with New York Casualty Company as surety. Meanwhile, Dugas, with others, had been required to interplead in the interpleader suit. His claim was found to be $4,160.68 and the pro-rata share of the fund available from the proceeds of the $20,-

000 bond was $1,141.29. This finding was confirmed and Dugas accepted his pro-rata share. Subsequently Dugas filed a second suit in the Louisiana court against New York Casualty Company, the surety on the appeal bond, asserting that American Surety Company had not diligently prosecuted its appeal but had brought the interpleader suit in the Federal Court and secured an injunction preventing him from having a determination of the appeal, thereby abandoning the appeal. Dugas prayed judgment for $3,019.39, the difference between his compensation claim as ascertained in the interpleader suit and the pro-rata share of the money in court actually paid him. The trial court sustained an exception to this suit and dismissed it, whereupon Dugas appealed to the Louisiana Supreme Court and secured a reversal and a remand for a trial. Thereafter American Surety Company filed a supplemental bill in the original interpleader suit in the Federal Court, setting forth substantially the above facts and alleging that Dugas' second suit was an attempt indirectly to subject American Surety Company to further liability on account of said bond, contrary to the decree of the Federal Court discharging it from further liability thereon, inasmuch as that company as principal would be bound to reimburse its surety, New York Casualty Company, if that company were found liable on the $10,000 appeal bond. On the basis of this bill, the Federal District Court made a supplemental decree, specifically enjoining Dugas from further prosecuting his suit in the state court against New York Casualty Company. On appeal the Fifth Circuit affirmed the decree below. On certiorari, the Supreme Court held that in bringing suit in the state court on the appeal bond, Dugas contravened the fair intendment of the decree in the interpleader suit, and, in ruling that the decree below was proper, said, l. c. 428:

> The jurisdiction to entertain the supplemental bill is free from doubt. Such a bill may be brought

in a federal court in aid of and to effectuate its prior decree to the end either that the decree may be carried fully into execution or that it may be given fuller effect, but subject to the qualification that the relief be not of a different kind or on a different principle. Such a bill is ancillary and dependent, and therefore the jurisdiction follows that of the original suit, regardless of the citizenship of the parties to the bill or the amount in controversy.

The power of the court to enjoin Dugas from further prosecuting his suit in the state court on the appeal bond has full support of Sections 2 and 3 of the Interpleader Act of 1926 before quoted, *as also in settled adjudications respecting the power of a federal court to protect its jurisdiction and decrees* (Italics ours).

By the foregoing decisions, this Court has established a well defined principle of equity, plain in meaning and uniform in application to all cases where subsequent attempts are made to relitigate issues adjudged by a prior federal decree. Clearly these decisions justify the relief asked for and granted here. Both opinions of the Eighth Circuit (102 F. 2d 16 and 112 F. 2d 927) are thoroughly in harmony with the declarations of this Court in the foregoing cases, and are in fact based upon them and expressly follow them.

The lower federal courts have followed and applied the foregoing decisions of this Court in a variety of cases, a few of which are:

Phoenix Finance Corp. v. *Iowa-Wisconsin Bridge Co.*, 8 Cir., 115 F. 2d 1, cert. granted Jan. 20, 1941, 61 S. Ct. 550, No. 624.

Hesselberg v. *Aetna Life Ins. Co.*, 8 Cir., 102 F. 2d 23.

Equitable Life Assurance Soc. v. *Wert*, 8 Cir., 102 F. 2d 10.

Fiske v. *Missouri*, 8 Cir., 62 F. 2d 150.

Mississippi Valley Trust Co. v. *Franz*, 8 Cir., 51 F. 2d 1047.

Sand Springs Home v. *Title Guaranty & Trust Co.*, 8 Cir., 16 F. 2d 917.

Hickey v. *Johnson*, 8 Cir., 9 F. 2d 498.

Swift v. *Black Panther Oil & Gas Co.*, 8 Cir., 244 F. 20.

King v. *Realty Mtg. Co.*, 5 Cir., 107 F. 2d 90.

Wilson v. *Alexander*, 5 Cir., 276 Fed. 875.

Holmes v. *Rowe*, 9 Cir., 97 F. 2d 537.

Brown v. *Pacific Mutual Life Ins. Co.*, 4 Cir., 62 F. 2d 711.

Ruhlin v. *New York Life Ins. Co.*, 3 Cir., 93 F. 2d 416.

St. Louis, I., M. & S. Ry. Co. v. *Bellamy*, 211 Fed. 172 (E. D. Ark.).

Sterling v. *Gredig*, 5 F. Supp. 329 (S. D. Tex).

American Surety Co. v. *Baldwin*, 2 F. Supp. 679 (S. D. Idaho).

The foregoing cases make it clear that the Eighth Circuit correctly applied established principles of equity arriving in at the result in this case. If Toucey, by the use of Shay, were permitted to relitigate in the Missouri state court the question already decided by the District Court for the Western District of Missouri, namely, whether or not Toucey was totally and permanently disabled, not only would respondent be required to defend itself anew in another and different court upon an issue already decided but, since it is conceivable, at least, that that court might reach a different result, respondent would be in the absurd position of being at the mercy of a State court judgment directly in conflict with a decree of a Federal court of equity and being compelled to perform that judgment in spite of the prior decree. Such a situation, we respectfully submit, violates every sentiment of justice and fairness just as it clearly violates the established principles of equity applicable to such situations.

Any result other than the one achieved by the Eighth Circuit would render futile the decrees of the District Courts, would lead to an unseemly conflict be-

tween federal and state jurisdictions, would render it impossible for parties to know when their rights and interests were finally adjudged and concluded, and would subject them to repeated legal assaults by disappointed litigants which they would be powerless to prevent.

In passing, it might be noted that the decisions of this Court upon this subject have been not only harmonious but unanimous. In not a single case in this Court which we have been able to find has a single Justice ever dissented in any opinion announcing and applying the principle applied by the Circuit Court of Appeals in this case.

II.

Section 265, Judicial Code (Sec. 379, Title 28, U. S. C.; R. S., Sec. 720), Does Not, under the Circumstances of the Present Case, Prevent a Federal Court from Staying Proceedings in an Action IN PERSONAM Pending in a State Court, Where the Purpose and Effect of the State Court Proceeding Is to Relitigate and Have Readjudicated Issues Finally Adjudicated by a Prior Federal Court Decree.

Title 265, Judicial Code, provides:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

This section must be construed in the light of Section 262, Judicial Code (Sec. 377, Title 28, U. S. C; R. S., Sec. 716), which authorizes the federal courts, including the District Courts, to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law.

Sec. 265 was first enacted March 2, 1793 (I Stat. 334, Sec. 5), and contained several unrelated provisions af-

fecting the judiciary. After restricting the use of the writ *ne exeat*, the section provided: "Nor shall a writ of injunction be granted to stay proceedings in any Court of a State." The Annals of Congress shed no light upon its meaning or the intent of Congress in passing it (Annals 3d Congress, Col. 143 (1793)). Mr. Charles Warren, in an article entitled "Federal and State Court Interference," 43 Harvard L. Rev. 345, 347 (1930), assumes that the provision resulted from the report by Attorney General Edmund Randolph to the House of Representatives of December 27, 1790, suggesting changes in the Judiciary Act of 1789. Randolph recommended that the Act provide that "no injunction in equity shall be granted by a District Court to a judgment at law of a State Court." It will be noted that the wording adopted by Congress is quite different from that recommended by Randolph and Mr. Warren's assumption is of at least doubtful validity.

This Court, however, has often stated the purpose of Sec. 265, and the Congressional policy in enacting it. It is a "safeguard"; it is to prevent "needless friction" and "unseemly conflict" between federal and state courts. *Oklahoma Packing Co.* v. *Oklahoma Gas & Elec. Co.*, 309 U. S. 4 (1940); *Hale* v. *Bimco Trading, Inc.*, 306 U. S. 375 (1939); *Essanay Film Co.* v. *Kane*, 258 U. S. 358 (1922).

In the *Hale case, supra*, Mr. Justice Frankfurter said, l. c. 378:

> That provision is a historical mechanism * * * for achieving harmony in one phase of our complicated federalism by avoiding needless friction between two systems of courts having potential jurisdiction over the same subject matter. *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, 183. The present record presents no occasion for bringing this safeguard into play.

There are several well-defined classes of cases which this Court has held do not come within the prohibition of the statute and in which the Federal courts have enjoined proceedings in State courts.

Some of these classifications are:

1. A Federal Court will enjoin the institution or prosecution in the State court of proceedings to enforce a local statute which is repugnant to the United States Constitution.

Ex parte Young, 209 U. S. 123 (1908).
Truax v. *Raich*, 239 U. S. 33 (1915).
Missouri v. *Chicago, B. & Q. R. R. Co.*, 241 U. S. 533 (1916).

2. A Federal court will enjoin the institution or prosecution of a State court action, the result of which would be to cast an undue burden upon interstate commerce.

Atchison, etc., Ry. Co. v. *Wells*, 265 U. S. 101 (1924).
Riehle v. *Margolies*, 279 U. S. 218 (1929).
Hill v. *Martin*, 296 U. S. 393 (1935).

3. A Federal court will enjoin the institution or prosecution of a State court action where the latter would interfere with the custody of a *res* previously acquired by the Federal court, or where the Federal court has the prior custody of property, in whatever form, by receivership, equitable foreclosure or other appropriate proceedings.

Covell v. *Heyman*, 111 U. S. 176 (1884).
Julian v. *Central Trust Co.*, 193 U. S. 93 (1904).
Riverdale Cotton Mills v. *Alabama & Georgia Mfg. Co.*, 198 U. S. 188 (1905).
Kline v. *Burke Construction Co.*, 260 U. S. 226 (1922).

4. A Federal court will enjoin the enforcement of a judgment obtained in the State court by fraud, without service of legal process, and without notice.

Arrowsmith v. *Gleason*, 129 U. S. 86 (1889).
Simon v. *Southern Ry. Co.*, 236 U. S. 115 (1915).

5. A Federal court will enjoin further proceedings in a State court in a case which has been removed to the Federal court.

French v. *Hay*, 22 Wall. 250 (1874).

Dietzsch v. *Huidekoper*, 103 U. S. 494 (1880).

Madisonville Traction Co. v. *St. Bernard Mining Co.*, 196 U. S. 239 (1905).

6. A Federal court which has issued a final decree in equity adjudging the rights of parties will, upon the filing of a supplemental bill, enjoin the institution or prosecution in a State court of an action, the object or effect of which is to relitigate and readjudicate issues settled by the decree of the Federal court, or which would otherwise tend to nullify that decree or lessen or impair its effect.

Root v. *Woolworth*, 150 U. S. 401 (1893).

Julian v. *Central Trust Co.*, 193 U. S. 93 (1904).

Riverdale Cotton Mills v. *Alabama & Georgia Mfg. Co.*, 198 U. S. 188 (1905).

Gunter v. *Atlantic Coast Line*, 200 U. S. 273 (1906).

Looney v. *Eastern Tex. R. R. Co.*, 247 U. S. 214 (1918).

Supreme Tribe v. *Cauble*, 255 U. S. 356 (1921).

Independent Coal & Coke Co. v. *United States*, 274 U. S. 640 (1927).

Local Loan Co. v. *Hunt*, 292 U. S. 234 (1934).

Dugas v. *American Surety Co.*, 300 U. S. 414 (1937).

The present case falls perfectly within the sixth classification, as the cases we have cited under Point I (B) of this brief clearly show and as the opinion of the Eighth Circuit Court of Appeals amply demonstrates. All of these classifications have been specifically held by unanimous decisions of this Court to constitute "exceptions" which do not come within the meaning or effect of Section 265.

We will now quote from a number of this Court's opinions, the language of which shows why the cases in the six classes mentioned do not come within the effect of Section 265. We have not attempted to classify all of the decisions of this Court, or to include in the classes enumerated every decision coming within them.

Wells Fargo & Co. v. *Taylor*, 254 U. S. 175 (1920), is a leading case. There Taylor, an employee of the express company, sued the railroad in a Mississippi State court for injuries received by the derailment of an express car and obtained a judgment. The express company attempted to intervene in that suit but was denied the right. It thereupon filed a bill in equity in the Federal court, alleging diversity of citizenship; that it had a contract with the railroad by which it agreed to indemnify the railroad against loss from injury to the express company's employees; that it also had a contract with Taylor, whereby he assumed the risk of his employment; and that neither the express company nor the railroad should under any circumstances be liable for any injury to him. The bill asked that the enforcement of the State court judgment be enjoined. The District Court issued the injunction, but the Circuit Court of Appeals reversed it. On certiorari, this Court held that the injunction was properly issued. Considering the effect of Section 265, Justice Vandeventer said, l. c. 183-4:

> The provision has been in force more than a century and often has been considered by this court. As the decisions show, it is intended to give effect to a familiar rule of comity and like that rule is limited in its field of operation. Within that field it tends to prevent unseemly interference with the orderly disposal of litigation in the state courts and is salutary; but to carry it beyond that field would materially hamper the federal courts in the discharge of duties otherwise plainly cast upon them by the Constitution and the laws of Congress, which of course is not contemplated. As with many other statutory provisions, this one is designed to be in accord with,

> and not antagonistic to, our dual system of courts. In recognition of this it has come to be settled by repeated decisions and in actual practice that, where the elements of federal and equity jurisdiction are present, the provision does not prevent the federal courts from enjoining the institution in the state courts of proceedings to enforce local statutes which are repugnant to the Constitution of the United States, *Ex parte Young*, 209 U. S. 123; *Truax* v. *Raich*, 239 U. S. 33; *Missouri* v. *Chicago, Burlington & Quincy R. R. Co.*, 241 U. S. 533, 538, 543; or prevent them from maintaining and protecting their own jurisdiction, properly acquired and still subsisting, by enjoining attempts to frustrate, defeat or impair it through proceedings in the state courts, *French* v. *Hay*, 22 Wall. 250; *Julian* v. *Central Trust Co.*, 193 U. S. 93, 112; *Chesapeake & Ohio Ry. Co.* v. *McCabe*, 213 U. S. 207, 219; *Looney* v. *Eastern Texas R. R. Co.*, 247 U. S. 214, 221; or prevent them from depriving a party, by means of an injunction, of the benefit of a judgment obtained in a state court in circumstances where its enforcement will be contrary to recognized principles of equity and the standards of good conscience, *Marshall* v. *Holmes*, 141 U. S. 589; *Ex parte Simon*, 208 U. S. 144; *Simon* v. *Southern Ry. Co.*, 236 U. S. 115; *Public Service Co.* v. *Corboy*, 250 U. S. 153, 160; *National Surety Co.* v. *State Bank of Humboldt*, 120 Fed. Rep. 593.

The portion of the language quoted which applies directly here is that in which the Court says the statute does not "prevent them (the federal courts) from maintaining and protecting their own jurisdiction, properly acquired and still subsisting, by enjoining attempts to frustrate, defeat or impair it through proceedings in the state courts." The classes of cases stated by Justice Vandeventer in which injunctions against state court proceedings are proper have been uniformly recognized and maintained by this Court.

The necessity for exceptions to the literal language of Section 265 is illustrated by one or two earlier cases. In *Dietzsch* v. *Huidekoper*, 103 U. S. 494 (1880), this

Court upheld the issuance of an injunction by a federal court, pursuant to a supplemental bill, against the further prosecution of an action in the state court which had been removed to the federal court. This Court said, l. c. 498:

> If the bill is not maintainable, the appellees would find themselves in precisely the same plight as if the judgment of the United States Circuit Court in the replevin suit had been against them, instead of for them. The judgment in their favor would settle nothing. Instead of terminating the strife between them and their adversaries, it would leave them under the necessity of engaging in a new conflict elsewhere. This would be contrary to the plainest principles of reason and justice.

The decision was founded on *French, Trustee*, v. *Hay*, 22 Wall. 250, *supra*.

In *Arrowsmith* v. *Gleason*, 129 U. S. 86 (1889), plaintiff filed a bill in equity in the federal court attacking an order of sale by the Ohio Probate Court authorizing the sale of certain lands, on the ground that the sale was fraudulent and wrongfully approved by the Probate Court, and asking that the decree set the sale aside. The lower court dismissed the bill upon demurrer upon the argument that the plaintiff had an adequate remedy at law by ejectment. This Court held that the bill stated a cause of action and was improperly dismissed. It quoted with approval (l. c. 99) from *Payne* v. *Hook*, 7 Wall. 425, where, on page 430, the court said:

> The equity jurisdiction conferred on the Federal courts is the same as that the High Court of Chancery in England possesses; is subject to neither limitation or restraint by state legislation, and is uniform throughout the different States of the Union. The Circuit Court of the United States for the District of Missouri, therefore, had jurisdiction to hear and determine this controversy, notwithstanding the peculiar structure of the Missouri probate system, and was bound to exercise it, if the bill, according to the

> received principles of equity, states a case for equitable relief. The absence of a complete and adequate remedy at law is the only test of equity jurisdiction, and the application of this principle to a particular case must depend on the character of the case as disclosed in the pleadings.

In *Julian* v. *Central Trust Co.*, 193 U. S. 93 (1904), cited in Point I (B) of this brief, the Court said, l. c. 112:

> In such cases where the Federal court acts in aid of its own jurisdiction and to render its decree effectual, it may, notwithstanding Sec. 720, Rev. Stat., restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction.

cit[illegible] *French* v. *Hay*, *supra*, and *Dietzsch* v. *Huidekoper*, *supra*.

In *Looney* v. *Eastern Tex. R. R. Co.* 247 U. S. 214 (1918), cited under Point I (B) of this brief, the Court said, l. c. 221:

> So important is it that unseemly conflict of authority between State and Federal courts should be avoided by maintaining the jurisdiction of each free from the encroachments of the other, that Sec. 265 of the Judicial Code * * * has repeatedly been held not applicable to such an injunction.

These cases emphasizes the principle that the "exceptions" which this Court has recognized from the operation of the Statute are for the purpose of avoiding conflict rather than of creating it.

In *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273 (1906), cited under Point I (B) of this brief, the Court said, l. c. 292:

> Indeed, the proposition that * * * section 720 of the Revised Statutes, control a court of the United States in administering relief, although the court was acting in a matter ancillary to a decree rendered in

a cause over which it had jurisdiction, is not open for discussion. *Dietzsch* v. *Huidekoper*, 103 U. S. 494; *Prout* v. *Starr*, 188 U. S. 537; *Julian* v. *Central Trust Co.*, 193 U. S. 93, 112.

One of the most illuminating cases in this Court is *Local Loan Co.* v. *Hunt*, 292 U. S. 234 (1934), cited under Point I (B) of this brief. Justice Sutherland said, l. c. 239:

> The proceeding being ancillary and dependent, * * * may be maintained * * * notwithstanding the provisions of Section 265 of the Judicial Code * * *.

In *Dugas* v. *American Surety Co.*, 300 U. S. 414 (1937), cited under Point I (B) of this brief, the Court said, l. c. 428:

> The power of the court to enjoin Dugas from further prosecuting his suit in the state court on the appeal bond has full support * * * in settled adjudications respecting the power of a federal court to protect its jurisdiction and decrees.

The existence of these well defined exceptions to the operation of the statute was particularly noted by Justice Brandeis in *Riehle* v. *Margolies*, 279 U. S. 218, 223, *supra*, and *Hill* v. *Martin*, 296 U. S. 393, *supra*. In *Riehle* v. *Margolies* the Court held that the appointment of a receiver on a creditor's bill did not give the federal court the right to stay a suit previously begun against the debtor in the state court, this he said not being one of the exceptions to the statute (although it is clear that a state court action subsequent to the appointment of a receiver would have been stayed to protect the federal court's prior jurisdiction).

In *Hill* v. *Martin*, Justice Brandeis, in holding that an injunction against the collection of a New Jersey inheritance tax was properly refused, said, l. c. 403:

> Thus, the prohibition applies whatever the nature of the proceeding, unless the case presents facts

which bring it within one of the recognized exceptions to Sec. 265. It is not suggested there is a basis here for any such exception.

This Court has as recently as January 15, 1940, considered Section 265 and held the case there presented to be within the statute. *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U. S. 4. There the Electric Company appealed to the Oklahoma Supreme Court from an order of the Oklahoma Corporation Commission reducing its utility rates. To protect a consumer, Wilson & Co., the Electric Company gave a supersedeas bond. It lost the appeal and Wilson sued on the bond in the Oklahoma state court. To enjoin prosecution of this suit, the Electric Company invoked the jurisdiction of the Federal District Court in Oklahoma, which enjoined the state court action. This Court reversed, Mr. Justice Frankfurter saying (l. c. 8):

> The decree below is thus within the plain interdiction of an Act of Congress, and not taken out of it by any of the exceptions which this Court has heretofore engrafted upon a limitation of the power of the federal courts dating almost from the beginning of our history and expressing an important Congressional policy—to prevent needless friction between state and federal courts. * * *.
>
> Neither record nor findings below give any other basis for injunctive relief save the threatened injury implied in the state court lawsuit; and that could not be enjoined.

Thus the very latest expression of this Court has recognized with approval the exceptions to the literal application of the statute, all recognized and enforced to fulfill the purpose of the Act—to prevent friction between the two jurisdictions. In all those classes of cases denominated exceptions by this Court, the issuance of the injunction has been necessary to preserve an orderly and harmonious maintenance of the respective functions of the federal and state courts, whereas its denial would have

had the very effect the statute was designed to avoid. Thus the construction and application of Section 265 depends upon the purpose and effect of the particular injunction. Where, as here, it prevents friction and preserves the integrity of a prior decree of the federal court, its issuance should be upheld.

Section 265 has *never* been construed to prohibit the issuance of an injunction to protect the integrity of a prior federal court decree and to prevent a subsequent attempt to relitigate in a state court issues already adjudged by that decree. On the contrary, this Court has repeatedly given its sanction to the issuance of such injunctions and the lower federal courts, following and applying the principles enunciated by this Court, have done likewise. See cases cited under Point I of our brief, pages 15-16.

There is nothing in the language of the statute to distinguish the particular class to which this case belongs from the other classes of exceptions. If it were held that injunctions could not issue in supplemental proceedings to protect the integrity of prior decrees in equity of the federal courts, it would follow that these courts would also be powerless to enjoin the enforcement of void local statutes, to enjoin proceedings which cast an undue burden on interstate commerce, and to enjoin state court proceedings which would interfere with the federal court's possession of a *res* or of property held in receivership or under equitable foreclosure. The federal courts could no longer protect actions which had been validly removed to them from the state courts. On the contrary, the State tribunals could proceed with such cases, thus, in effect, nullifying the removal statute, since there is no act of Congress which expressly authorizes injunctions where cases have been removed. Hence, the effect, if the salutary exception to the rule exemplified in the present case were abrogated, is incalculable, and would not only cripple the normal function of the federal courts, destroy a great body of law which the unanimous deci-

sions of this Court have built up over a period of many years, but would lead to that very conflict between the federal and state courts which the statute under consideration seems to have been designed to eliminate. The exceptions to the statute which we have mentioned, as this Court has said, are designed not to frustrate the statute but to carry out the purpose for which it was enacted.

PETITIONER'S CASES.

Petitioner relies upon *Kline* v. *Burke Const. Co.*, 260 U. S. 226 (1922), and similar cases from the Eighth Circuit. That decision is unquestionably correct upon the particular facts, but it has no application here. There the action pending in the federal court was an action at *law* and sought a money judgment only. The Construction Company sued Kline in the federal court for damages for breach of contract. Subsequently, Kline sued the Construction Company in equity in the state court for an accounting and damages. The two cases presented substantially the same issues. Thereupon the Construction Company filed a bill as a dependent bill to its law action to enjoin Kline from further prosecuting his state court equity case, although nothing had been decided in the federal court action. This Court simply decided that a federal court has no power in an action at law to enjoin proceedings *in personam* concurrently pending in the state court, where the effect of the state court proceeding would not be to defeat or impair the jurisdiction of the federal court.

Thus, there are important distinctions between the Kline case and this case. Since the federal court action was at law, its *equitable* powers could not have been invoked. The federal and state court cases were entirely separate and distinct. Since the federal court action had not proceeded to judgment, there was nothing which that court could or should protect in the way of a final decree. The state court case did not represent an at-

tempt to relitigate or have readjudicated any issues previously decided by the federal court, because that court had decided nothing.

The decision in the Kline case was written by Mr. Justice Sutherland, who twelve years later wrote the opinion in *Local Loan Co.* v. *Hunt*, 292 U. S. 234. He made no reference in the Hunt case to the Kline case and in spite of the fact that he must have been fully familiar with it, he reaffirmed and reapplied the principle for which we are contending here, namely, that Sec. 265 does not prohibit the issuance of an injunction against state court proceedings, the effect of which is to relitigate and have readjudicated issues already adjudged by a prior federal equity decree. Judge Woodrough said in the first Toucey appeal (102 F. 2d 16, l. c. 23):

> The court made no reference in the case just quoted from (the Hunt case) to its earlier opinion in *Kline* v. *Burke Construction Co., supra*, because in the earlier case the court had confined its consideration to the co-pending suits "for a money judgment only," in neither of which adjudication had been arrived at and where no question of "effectuating adjudication" was involved.

Petitioner suggests that the doctrine of the Kline case limits the power of a federal court to enjoin proceedings in a state court to cases in which the federal court has custody of a *res*, the protection of which by injunction is necessary to proper control and administration by the federal court. Such a suggestion mistakes the nature of federal equitable jurisdiction in a case such as this. The power to issue an injunction does not depend upon the custody of a specific *res*. An equity court has the inherent power to protect and preserve the integrity of its own decree. Nothing in the declaration of this principle in *Root* v. *Woolworth*, *supra*, and other cases, limits its application to proceedings *in rem*. The principle has an entirely different origin and has no reference to whether there is or is not a *res* in the custody of the

federal court. Judge Parker in *Brown* v. *Pacific Mutual Life Ins. Co.*, 4 Cir., 62 F. 2d 711, has made this clear, l. c. 713:

> * * * we find nothing in it (*Kline* v. *Burke Const. Co.*) which limits to actions *in rem* the right of a federal court of equity to protect its jurisdiction. It involved no situation where it was necessary for a court of equity to protect against encroachment on its jurisdiction or the lawful effect of its orders and decrees, but merely one where independent proceedings were pending in the state and federal courts, in both of which the ultimate relief sought was a money judgment (insert ours).

The District Court below recognized and gave effect to these considerations. See Petitioner's application for certiorari, page 63.

III.

To Construe Section 265 to Prohibit the Injunction Issued in This Case Would Create Grave Doubts Respecting Its Constitutionality under Section 2 of Article III of the United States Constitution. Section 265 Should Be So Construed As to Avoid These Doubts, in Harmony with the Uniform and Unanimous Decisions of This Court.

Section 1 of Article III of the Constitution says that "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." Section 2 reads as follows:

> "Section 2. *Extent of judicial power.* The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States;

> between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects."

Article I, relating to the legislative power, says in Section 1:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Section 8, which specifically enumerates the powers of Congress, says, "The Congress shall have power * * * to constitute tribunals inferior to the Supreme Court" and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

It seems clear from these sections that, while the Constitution leaves it to Congress to constitute the inferior tribunals in which that portion of the "judicial power" not vested by the Constitution in the Supreme Court shall repose, it does not confer any discretion upon Congress whether that judicial power "shall extend to all cases in law and equity" but specifically commands that such judicial power shall extend to all such cases.

This Court has expressly held that the right to issue injunctions which inheres in a court of equity is a question of power, not a mere question of jurisdiction.

> *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66 (1939).
>
> *Hill* v. *Martin*, 296 U. S. 393 (1935).
>
> *Smith* v. *Apple*, 264 U. S. 274 (1924).

It is entirely conceivable that Congress might properly deprive the District Courts of the United States of those powers equitable in nature which they have here-

tofore exercised, including the power to issue injunctions provided for by Section 277, Judicial Code (Sec. 263, Title 28, U. S. C.), provided Congress at the same time, constituted other inferior courts having those equity powers, as the Constitution requires. It is not conceivable, however, that without creating other courts invested with those powers, Congress could, in the face of the Constitutional mandate, entirely deprive a Federal District Court of its powers as a court of equity.

The question then arises—Can Congress divest the court of equity of *any* of its essential equitable powers without thereby violating the requirements of Section 2 of Article III, one of which is the inherent power to effectuate its own decrees and protect their integrity against attempts to render them nugatory. This power, as we mentioned earlier in this brief, is of ancient origin and inhered in courts of equity long before the Federal Constitution was adopted.

In *Irvine* v. *Marshall*, 20 Howard 558 (1857), the question was whether or not the federal district court as an equity court could, in the absence of express statutory provisions, recognize and enforce a resulting trust arising upon the defendant's purchase of land with plaintiff's money. The Court held that by Section 2 of Article III and the statute organizing the inferior judiciary of the United States, the federal courts possessed all those incidents of equity jurisdiction established in English jurisprudence and, therefore, such a court could enforce plaintiff's equity. The Court said, l. c. 564:

> * * * the jurisdiction of the courts of the United States is properly commensurate with every right and duty created, declared, or necessarily implied, by and under the Constitution and laws of the United States. Those courts are created courts of common law and equity; and under whichsoever of these classes of jurisprudence such rights or duties may fall, or be appropriately ranged, they are to be taken cognizance of and adjudicated according to the settled

and known principles of that division to which they belong.

By the language of the Constitution it is expressly declared (art. 3d, sec. 2, clause 1), that the judicial power of the United States shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made under their authority. By the statute which organized the judiciary of the United States, it is provided, that the Circuit Courts shall have jurisdiction of suits of a civil nature "at common law or in equity" (*Vide* 1 Stat. at L., p. 78, section 11). In the interpretation of these clauses of the Constitution and the statute, this court has repeatedly ruled, that by cases at common law are to be understood suits in which legal rights are to be ascertained and determined, in contradistinction to those where equitable rights alone are recognized, and equitable remedies are administered *Vide Parsons* v. *Bedford*, 3 Pet. 447, and *Robinson* v. *Campbell*, 3 Wheaton 212). That by cases in equity are to be understood suits in which relief is sought according to the principles and practice of the equity jurisdiction, as established in English jurisprudence (*Vide* the case of *Robinson* v. *Campbell*, just cited, and the *United States* v. *Howland*, 4 Wheaton 108).

Michaelson v. *United States*, 266 U. S. 42 (1924), involved the constitutionality under Sec. 2, Art. III, of that provision of the Clayton Act giving the right of trial by jury in contempt proceedings to those found violating decrees of injunction in labor controversies. It was argued that the power of a court to vindicate or enforce its decree in equity is inherent and is derived from the Constitution as a part of its judicial power, and that Congress is without Constitutional authority to deprive the parties in an equity court of the right of trial by the Chancellor. The Circuit Court of Appeals for the 7th Circuit had upheld this argument (291 Fed. 940). This Court said, l. c. 64:

"If the statute now under review encroaches upon the equity jurisdiction intended by the Constitu-

> tion, a grave constitutional question in respect of its validity would be presented; and it, therefore, becomes our duty, as this court has frequently said, to construe it 'if fairly possible so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.' *Panama R. R. Co. v. Johnson*, 264 U. S. 375."

Justice Southerland then construed the statute to mean that the contempt proceedings provided in the Act applied to criminal and not civil contempt and, therefore, the accused had a constitutional right to trial by jury. However, he recognized the constitutional principle that Congress can not by legislation impair or restrict a power of a court inherent in its nature. He said, l. c. 65:

> But it is contended that the statute materially interferes with the inherent power of the courts and is therefore invalid. That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power. So far as the inferior federal courts are concerned, however, it is not beyond the authority of Congress (*Ex parte Robinson*, 19 Wall. 505, 510-511; *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 326); *but the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative.* That it may be regulated within limits not precisely defined may not be doubted. The statute now under review is of the latter character (Italics ours).
>
> See, also, *Crowell* v. *Benson*, 285 U. S. 22 (1932).

It may well be that Congress can limit the power of injunction by eliminating a particular type of controversy from its effect, as this Court has held with respect to the Norris-LaGuardia Act restricting the right of injunction in labor disputes. *Lauf* v. *E. G. Shinner & Co.*, 303

U. S. 323. But the present situation is of a different kind. Sec. 265 literally construed does not limit the use of the injunction to a particular class of controveries but purports to abolish its use in *every* class of controversies where to use it will effect a stay of proceedings in a state court. If a court of equity is deprived of the power to carry out and effectuate its own decrees it in effect ceases to be a court of equity. If, for example, after a federal court of equity has ordered one in possession to surrender land which he is withholding from a successful claimant, he can maintain in a state court a suit to quiet his title against the successful claimant, the federal court might just as well not have rendered any decree at all, because it could not be carried out. A decree which cannot be effectuated or enforced is no decree at all. It cannot have been contemplated by the framers of the Constitution, in view of the categorical language used in Article III, that Congress should create an inferior court having the form of a court of equity but none of its substance.

This Court has often stated that the cardinal principle of statutory construction is to save and not to destroy, and thus has held that as between two possible interpretations of a statute, by one of which it would be constitutional and by the other void, its plain duty is to adopt that which will save the Act. Even to avoid a serious doubt, the rule is the same. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337; *Crowell* v. *Benson*, 285 U. S. 22.

That Section 265 can readily be, consistent with its object, so construed as to effectuate its purpose without creating a doubt respecting its constitutionality is obvious from the many cases already cited, in which exceptions to its effect have been recognized. That such an interpretation as this Court and inferior courts have heretofore given the statute ought to be respected is clear from the recent pronouncements of this Court upon the subject of statutory construction.

In *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, Mr. Justice Reed said, l. c. 542:

> In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. * * *
>
> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. *When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words.* When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination" (Italics ours).

It is very evident from the uniformity and unanimity with which this Court in the past has observed certain well defined exceptions to the terms of Section 265 that this Court has given the Section far more than a mere "superficial examination."

In *Wisconsin* v. *J. C. Penney Co.*, 61 S. Ct. 246, Mr. Justice Frankfurter quoted with approval the following language from *Henderson* v. *Mayor of New York* (92 U. S. 259), l. c. 249:

> In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.

It is therefore earnestly submitted that to avoid grave doubts respecting the constitutionality of section 265, the settled interpretation heretofore uniformly given it by this court should not be disturbed. Particularly is this true here where petitioner has not briefed nor discussed this very important subject. This Court should not overthrow the accepted construction of Section 265 and principles of equity settled for many years without cogent and compelling reasons being advanced by him who urges such action.

Conclusion.

From the foregoing, we trust that we have made it clear to the Court that the Eighth Circuit Court of Appeals, in reaching the result it did in this case, faithfully followed a well defined rule of law established by the uniform precedents set by this Court cited in our brief. It must also be clear that the Circuit Court of Appeals properly applied that rule of law to the facts in this case. The existing interpretation as applied to the present controversy is so plain and has been so uniform and so unanimous, and the consequences of a change would be so far reaching and so disastrous in creating the very conflict of jurisdiction which the statute has been held designed to avoid, that we trust this Court will see its way clear to follow its previous interpretation of the Statute and affirm the decree of the Circuit Court of Appeals.

On March 3rd, after this brief was sent to the printer, but before it was finally printed, we were served with a typewritten "Brief in Argument before Supreme Court of the United States." This "brief" is simply a reiteration of all that irrelevant matter in petitioner's "Petition for Writ of Certiorari" relating to the various acts of misconduct charged by petitioner to have been committed by respondent's employees in the trial of the original case. Besides violating Rule 27 of the Revised Rules of this

court (February 27, 1939), the brief obviously is of no assistance to this court in deciding the questions on which, we think, certiorari was granted.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 587. 16

SAMUEL R. TOUCEY, PETITIONER,

VS.

NEW YORK LIFE INSURANCE COMPANY,
A CORPORATION, RESPONDENT.

RESPONDENT'S SUPPLEMENTAL BRIEF.

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 587.

SAMUEL R. TOUCEY, PETITIONER,

VS.

NEW YORK LIFE INSURANCE COMPANY, A CORPORATION, RESPONDENT.

RESPONDENT'S SUPPLEMENTAL BRIEF.

In Respondent's Brief it is shown that one of the long established and well recognized grounds of injunctive relief by supplemental bill is to prevent the re-litigation in another court of issues finally settled by a decree in equity (Respondent's Brief, p. 17 *et seq.*). We also showed that the uniform decisions of this Court for at least the last fifty years have held

that Section 265 of the Judicial Code (Sec. 379, 28 U. S. C.; R. S., Sec. 720) does not prohibit the issuance of an injunction to prevent a party from re-litigating in a state court issues already adjudicated by a federal equity court (Respondent's Brief, page 21 *et seq.*). We pointed out that the present is such a case and, therefore, that if the uniform prior decisions of this Court are still the law the ruling of the Eighth Circuit in this case (102 Fed. 2d 16 and 112 Fed. 2d 927) must be affirmed.

This Court has, however, granted certiorari in several cases bearing no similarity on the facts to this case and having the single common characteristic that lower federal courts had enjoined the parties for various reasons from proceeding in state courts. At least three of these cases were decided by this Court by four to four votes and have been set down for argument on the opening day of the October term. The remaining case (of which we know) is still pending here on petition for certiorari. It is therefore evident that this Court is primarily interested in a question of judicial policy rather than in the justice or injustice of the ruling in any particular case. We can only guess the sources of this new interest in a subject on which the law, both federal and state, as well as the law of England and its dominions, has long been settled. We believe that some members of this Court doubt the wisdom of permitting the federal courts to enjoin parties from proceeding in state courts under any circumstances and therefore wish to review the purpose and scope of Section 265 with the object of changing its present interpretation.

We shall, therefore, assume for the purpose of this supplemental brief that the question for review is this: *Is a federal injunction against proceedings in a state court such an unwarranted interference with the processes of that court, leading to such conflict and dissonance that Section 265 of the Judicial Code should be invoked to abolish it under all circumstances.* Such injunctions at the

present time issue only under exceptional circumstances (Respondent's Brief, p. 35). The question is whether the *exceptions* should be abolished.

It is demonstrated in Respondent's Brief that upon principle and authority, including many decisions of this Court, the injunction issued by the district court in this case was a lawful and proper exercise of its equity powers, not an unseemly interference with the state court's jurisdiction. To have withheld the injunction here might have resulted in a state court judgment directly contrary to the equity decree and, hence, an undesirable conflict between the rulings of the two courts, the thing Section 265 of the Judicial Code was designed to prevent. So this court and the inferior courts have held.

It occurred to us that in this brief it might be helpful to the Court to broaden the field of inquiry to ascertain what the state courts, including the Missouri courts, would have done were the positions of the two tribunals reversed, or were the respective actions pending in two state courts. Whether a state court would have enjoined proceedings in the Federal Court if the positions of the two courts were reversed, and whether one State court would have enjoined another state court were both actions pending in state courts, has an important bearing on the construction to be given Section 265. If injunctions are issued by the state courts against proceedings in Federal courts, and against proceedings in other state courts under the same circumstances under which Federal injunctions against state court proceedings have heretofore been sanctioned, it would seem reasonable to construe Section 265 to preserve the same powers to the Federal courts in order to protect the co-ordinate jurisdiction of the Federal courts and to prevent their being deprived of a power which all other similar courts possess in those instances heretofore recognized by this Court as exceptions to the literal language of Section 265.

SUMMARY OF THE ARGUMENT.

The principle of law that a court of equity will enjoin the parties or those in privity with them from relitigating in the courts of other jurisdictions a question already settled by final decree is not confined to the federal courts but is of universal application. The state courts have invoked it to enjoin actions pending in federal courts, to enjoin actions pending in other state courts, and to enjoin actions pending in other courts within the state. Likewise, the federal courts have invoked it to enjoin parties from proceeding in other federal courts. It is the law of England.

This court's present construction of Section 265 of the Judicial Code (Sec. 379, 28 U. S. C.; R. S., Sec. 720) which recognizes the case at bar as an exception to the prohibition of the statute has merely enabled the federal courts to rule in harmony with all other courts possessing coordinate jurisdiction in our system of jurisprudence. To repudiate this principle or withhold its application in this case would seriously impair the power of the federal court, and would be contrary, not merely to a long line of decisions by this court and the lesser federal courts, but to a rule of universal application in all courts throughout the United States and the English speaking world.

ARGUMENT.

STATE COURTS ENJOIN PARTIES FROM PROSECUTING ACTIONS IN THE FEDERAL COURTS ON SUBSTANTIALLY THE SAME GROUNDS ON WHICH THE FEDERAL COURTS ENJOIN PROCEEDINGS IN STATE COURTS.

If the position of the federal and the state courts in the case at bar were reversed the Missouri Supreme Court would have directed that the prosecution of the federal action be enjoined.

In *Wonderly* v. *Lafayette County*, 150 Mo. 635, 51 S. W. 745, 73 Am. St. Rep. 474, 45 L. R. A. 386 (1899), the plaintiff's assignor, a resident of Illinois, had judgment in the Federal Court for the Western District of Missouri against the defendant on certain bonds issued by the county. Afterward this judgment was assigned to the plaintiff, a resident of Missouri, who sued the defendant in the Circuit Court of Lafayette County. The county set up as a defense that the judgment in the Federal Court was procured by fraud for the following reasons: The state courts, in other litigation, had previously held the issue of which these bonds were a part invalid. The Federal Court, in other litigation, had previously held them valid. The real owner of the bonds, a citizen of Missouri, caused the original action to be brought in the Federal Court by the resident of Illinois alleging that he was the owner of the bonds in order to secure the benefits of federal jurisdiction. Having procured the Federal judgment, and the term having gone by so that it could not be set aside, the Illinois resident assigned the judgment to the resident of Missouri in order that he might enforce it in the state court and in order that the suit on the judgment might not be removed to the federal court. The answer asked that

the judgment in the Federal Court be set aside and that the plaintiff be enjoined against the prosecution of a writ of *scire facias* sued out in the Federal Court. On plaintiff's motion the trial court struck out all of this portion of the answer and, judgment going for the plaintiff, the Missouri Supreme Court on appeal held that the answer stated a good defense to the action on the judgment and a good ground for equitable relief. After reviewing the authorities in other jurisdictions, the court said, l. c. 749:

> The law which required the owner of the bonds to be a citizen of another state, in order to give the federal court jurisdiction, was a law of that court, and the plaintiff's act of masking as Owings, and thus gaining entrance, which, with his own face, he could not have gained, was a fraud on that law; and since, by that means, he evaded the law of this state applicable to his cause of action, as pronounced by this court, his judgment is to be deemed as in fraud of the law of this state, and not entitled to the protection of its courts. Freem., Judgm., Sec. 566; *Dunlap* v. *Cody*, 31 Iowa 260; *Duringer* v. *Moschino*, 93 Ind 495.

and after discussing the authorities further said, l. c. 750:

> We quote the words of these high courts and distinguished jurists to show in what estimation they hold the conduct of those who, by cunning, would pervert the administration of justice. There is no difference, in principle, between the fraudulent concoction of a scheme that brings the defendant within the jurisdiction of a court of a foreign state and the fraudulent concoction of a scheme that brings him within the jurisdiction of the federal court, which otherwise would not have had jurisdiction over him. In whatever aspect we view it, we cannot fail to see that the judgment in question was obtained by a fraudulent abuse of the court which rendered it, and a fraudulent scheme by which the defendant was tricked out of the defense it had a right to make, and could have made in the only forum in which the real plaintiff could have sued.

and further said, l. c. 750:

> *A suit in equity to set aside a judgment in no sense assails the court in which the judgment was rendered.* It is simply a proceeding *in personam*, and the decree adjudges the rights of the parties *inter sese* in relation to that judgment. Story, Eq. Jur., Sec. 875; Black, Judgm., Sec. 919; *Pearce* v. *Olney*, 20 Conn. 544; *Marshall* v. *Holmes*, 141 U. S. 589, 12 Sup. Ct. 62. A judgment of a United States circuit court sitting in this state is to be accorded such effect, and such effect only, as a judgment of a circuit court of this state. Black, Judgm., Sec. 938; *Crescent City Live-Stock Co.* v. *Butchers' Union Slaughter-House Co.*, 120 U. S. 141, 7 Sup. Ct. 472. The federal circuit courts have never claimed for themselves higher authority than the highest courts of original jurisdiction of the state in which they sit, and the lofty spirit in which those courts administer justice repels the idea that they would claim that a judgment of theirs, procured by fraud and abuse of their jurisdiction should be held exempt from a direct attack in the only forum in which the injured party could obtain relief (italics ours).

The Court expressly pointed out that the judgment of the Federal Court had become final with the passing of the term and, therefore, could not be set aside by the Federal Court "and, the defendant being a citizen of Missouri could bring no independent suit in equity in that tribunal." The court said that the writ of *scire facias* had doubtless "taken its course" pending the appeal and that, therefore, a writ of injunction would, doubtless, be without effect.

The similarity *in substance* between that case and this is striking. Here Toucey was defeated in his original action and a decree dismissing his bill on the merits duly entered (R. 43). No appeal was taken. Thereupon on December 28, 1937 (R. 22), more than a year after the dismissal of the original equity action, one James Shay, a citizen of the District of Columbia, brought suit against respondent in the Circuit Court of Jackson County, Mis-

souri (R. 53), alleging that he was the assignee of Toucey's cause of action. The assignment is shown at R. 62. It is attached to a stipulation (R. 60) respecting the testimony of James Shay which states, in effect, that Shay had known one of Toucey's attorneys for six or seven years; that he had never met Toucey; that he was requested by Toucey's attorney to accept an assignment of the cause of action; that he never knew anything about the nature of the claim except what the attorney told him; that he expected to account to Toucey for the proceeds collected; that he gave Toucey nothing of value for the assignment. Shay further states in the stipulation (R. 61):

> I accepted the assignment of the cause of action as an accommodation to Mr. M. W. Borders, Jr., it being my understanding that the legal title to the cause of action being in my name and the suit being in my name, and my being a resident of the District of Columbia, there would be no diversity of citizenship as between me and the New York Life Insurance Company within the meaning of the statutes relating to the removal of causes of action.

The purported assignment from Toucey to Shay was therefore a mere fraudulent device for the purpose of enabling Toucey, through Shay, to relitigate in the state court the same issues adjudged by the decree in equity in the Federal Court and to forestall any action by the Federal court by preventing the defendant from removing the case. It could not remove a suit brought by a citizen of the District of Columbia.

The Court will observe that Shay's action was merely a suit at law on the policy for disability benefits claimed to be due Toucey, alleging (R. 54) that Toucey had paid all the premiums due and that the policy was in full force and effect and that Toucey had performed all of its terms and conditions, entirely contrary to the allegations of Toucey's original petition (R. 26 *et seq.*) and to the findings of the learned trial judge (R. 44 *et seq.*). As the Circuit Court of Appeals said (102 Fed. 2d l. c. 20):

> After that final adjudication has been made and decree entered, a law case for recovery of disability benefits has been ingeniously made out on the face of a petition in the state court by simply omitting the facts as they were established between the parties in the federal equity suit. The pleader has omitted to show that Mr. Toucey made application to the insurance company for reduction of his policy and that pursuant to that application the alteration and reduction of the policy as to premiums and benefits was made and that he had recognized the change in the contract by making a payment of premium at the reduced premium rate.

And further said, l. c. 20:

> Mr. Toucey can not by mere concealment or change of form of procedure obtain an effective adjudication contrary to the adjudication in the federal court. Both his claims to life insurance and to disability benefits under the policy have been settled against him.

If it was wrong for Wonderly to shift his cause of action back and forth between a citizen of Missouri and a citizen of Illinois to secure adjudications by courts he thought were favorable to him, thus arousing the manifest indignation of the Missouri Supreme Court, why is it not wrong for Toucey to do so? If it is wrong for Toucey to do so why should not the Court to which he first resorted stop him from doing so? It is a court of equity. It cannot be that this Court is less inclined to discourage the injustice to a litigant which would result from such an ingenious but wrongful device than are the courts of the various states.

Reagan v. *Dick*, 233 Pac. 159 (Colo., 1925), presents the identical situation here except that the original action was brought in the Colorado state court and the subsequent action in the federal court. An equity suit was begun and proceeded to final decree. Afterward the losing party began an action in the Federal Court for the

District of Colorado to re-litigate the same question, which subsequently was appealed to the Circuit Court of Appeals where it was pending. A decree was then obtained from the Colorado state court enjoining the further prosecution of the federal action. It was affirmed on appeal. The Supreme Court said, l. c. 160:

> That the court, federal or state, which first begins the exercise of its jurisdiction, holds it, is clear (15 C. J. 1176), and it follows, of course, that such a proceeding cannot be enjoined or prevented by enjoining the parties. It has been held, however, that, when the jurisdiction of a United States court has first attached, it may enjoin the parties from proceeding in a state court concerning "the identical controversies therein pending," and we see no answer to the proposition that the state court in a converse case may do the same. It has actually been done. *Home Ins. Co.* v. *Howell*, 24 N. J. Eq. 238, cited with approval in *Moran* v. *Sturges*, 154 U. S. 256, 14 S. Ct. 1019, 38 L. Ed. 981.

The Court further said, l. c. 160:

> The complaint in the present action alleges that there was a former action between the parties, see 74 Colo. 293, 294, 220 Pac. 990, wherein the present plaintiffs were defendants, in which they were granted an injunction against interference with their possession and use of certain mining property, and that the proceedings in the United States court were begun for the purpose of retrying the issues tried in that former suit, which would be unlawful. *Riverdale Mills* v. *Mfg. Co.*, 198 U. S. 188, 25 S. Ct. 629, 49 L. Ed. 1008. The lower court found this to be true, and we cannot review that finding. It follows that, upon the record before us, the procedure in the federal court is not the first but the second exercise of jurisdiction over litigation, not only begun, but already in judgment in the state court, and the injunction in the present case is not void.

While the original state court action in *Reagan* v. *Dick* was *in rem* involving the rights of the parties to a mining property, the issuance of the injunction enjoin-

ing the parties from proceeding in the federal court is not placed on any such ground but on the ground of the previous adjudication by the Colorado court.

In *Moebius* v. *McCracken*, 261 Mich. 409, 246 N. W. 163 (1932), a minor by next friend sued at law for personal injuries in an Ohio court from which the action was removed to the federal court for that district. On a compromise the federal court entered judgment for the plaintiff for an agreed sum. Six years later, being then of age, she brought two suits in the Michigan state court, one at law for damages for the injuries and the other in equity asking that the judgment of the federal court in Ohio be declared a nullity and that the defendant be enjoined from setting up the Ohio judgment as a bar to her suit at law. The grounds of the bill were that the compensation adjudged in the federal court was inadequate for the injuries, that the federal court in arriving at the amount of the judgment considered only the compromise agreement and did not review the merits of the claim and that she had suffered great pain, expense and disability since. She alleged that the defendant could not be served in the State of Ohio and that the judgment in the Ohio federal court could not be vacated because the term had long passed. On appeal from an order below dismissing the bill the court held that it stated a good cause of action, saying, l. c. 167:

> While we will not refuse recognition to a foreign judgment regularly entered, nor, as a rule will we set aside such a judgment in an independent equity proceeding, by exercising chancery power over the parties, nevertheless, when it appears from the face of the judgment itself that it was entered in accordance with a compromise settlement, as a mere formality designed to lend strength to the agreement affecting minors' rights and without the benefit of testimony or a judicial examination of the merits of the case or the fairness of the compromise, a court of equity, in performance of its duty to protect the interests of minors, should give relief. To deny plain-

> tiff the right to bring the suit may result in depriving her of any remedy at law for what may be a flagrant fraud practiced on her.

The Court cites and relies on *Wonderly* v. *Lafayette County, supra.*

In *Prudential* v. *Merritt-Chapman & Scott Corp.*, 163 Atl. 694 (N. J. Chancery, 1932), the controversy arose upon the death of one Baker on whose life insurance aggregating $1,000,000 had been written by various companies. The beneficiary sued on the policies, on one in the Federal Court for the District of New Jersey, on one in the New Jersey Supreme Court and on the others in the New York Supreme Court. The companies filed suits for the cancellation of the policies in the New Jersey Chancery Court on the ground that the issuance of the policies had been procured by the fraud of Baker and asked that the beneficiary be enjoined from prosecuting the law actions pending the determination of the issues in the equity suits. The Court held that the companies were entitled to the injunctions because in point of time the equity suits had been "first commenced" and that the right of the companies to set up their equitable defenses in the law actions was not "an adequate remedy" such as to entitle the law actions to have priority. The Vice Chancellor considered the authorities carefully. The principle upon which the Court proceeded is stated as follows, l. c. 895, 896:

> That this court has power to enjoin one subject to its jurisdiction from the prosecution of an action at law pending the determination of the validity of the instrument upon which such law action is based and alleged to be void for fraud is elementary; and this, also, whether such action is pending in the law courts of this or of a foreign jurisdiction, and irrespective of precedence of time between this and the law courts, providing the remedy here is more complete and adequate than at law. *Home Insurance Company* v. *Howell*, 24 N. J. Eq. 238; *New Jersey*

> *Zinc Company* v. *Franklin Iron Company*, 29 N. J. Eq. 422; *Margarum* v. *Moon*, 63 N. J. Eq. 586, 53 Atl. 179; *Bigelow* v. *Old Dominion Copper Mining & Smelting Company*, 74 N. J. Eq. 457, 71 Atl. 153; *Lehigh Valley Railroad Company* v. *Andrus*, 91 N. J. Eq. 225, 109 Atl. 746; *Caruso* v. *Caruso*, 103 N. J. Eq. 487, 143 Atl. 771. * * * The principle lying at the foundation of this rule was early recognized and applied in England by Lord Ellenborough, just after the close of the eighteenth century, in *Payne* v. *Drew*, 4 East 523, cited in the *United States ex rel. Riggs* v. *Board of Supervisors of Johnson County*, 72 U. S. (6 Wall.) 196, 18 L. Ed. 768, 776, and also in *Taylor* v. *Carryl*, 61 U. S. (20 How.) 583, 617, 15 L. Ed. 1028, 1032.

Keith v. *Alger*, 114 Tenn. 1, 85 S. W. 71 (1905), holds that a state court can and will enjoin the enforcement of the decree or judgment of a federal court where it is shown that it was procured by fraud extrinsic to the questions examined and determined in the action, saying, l. c. 76:

> There is no doubt, as we think, that a state court may entertain a bill to restrain the enforcement of a decree or judgment of a federal court on the ground that the latter was procured by fraud. This is an independent right of action that does not involve a retrial of the issues disposed of in such former cause. It has been held that the federal courts may entertain such a cause of action against a judgment of a state court. The reasons and the authorities on which they are based are fully considered in the case of *Marshall* v. *Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870; likewise in the case of *National Surety Company* v. *State Bank*, 56 C. C. A. 657, 120 Fed. 593, 61 L. R. A. 394. The same reasons control an application in a state court to restrain the enforcement of a decree or judgment rendered by a federal court.

There, however, the fraud submitted to the Tennessee Court had already been submitted to and ruled on by the federal court in a proceeding by supplemental bill

and the state court therefore held that since the express issue raised had been ruled by the federal court, its ruling was *res judicata* and the state court bill should be dismissed. The original suit in the federal court had been to set aside a conveyance of real estate for the vendor's fraud and to require the return of the vendee's money. The equity suit in the state court was on the ground that the vendee had acquiesced in the transaction by, subsequently, with knowledge of the facts, making conveyance of the property to another for a valuable consideration.

Mock v. *Kennedy*, 11 La. Annual 525, 66 Am. Dec. 203 (1856). The plaintiff brought a suit the object of which was to secure a separation of her property from that of her husband after his insolvency and suit by creditors. Judgment had been secured against the husband in the federal court to which the wife was not a party, from which a writ of execution had issued to the marshal to seize the husband's property. The Court held that an injunction was properly issued below against the marshal to abstain from the commission of a trespass by executing the writ against property adjudged in the state court action to be the separate property of the wife.

In *Howard* v. *Cannon*, 11 Richardson's Eq. 23, 75 Am. Dec. 736 (S. Car., 1859), Cannon assigned to Howard as trustee for the benefit of Cannon's creditors. Then others recovered a large money judgment against Cannon in the Federal Court for South Carolina and the marshal was proceeding to seize and sell certain slaves which Cannon had assigned to Howard. The court held that the Commissioner below was right in enjoining the creditors from seizing and selling the assigned property pursuant to the Federal Court judgment, saying, l. c. 738:

> The second ground of appeal assails the reasoning expressed in the pleas, that the subject of controversy was within the exclusive jurisdiction of the circuit court of the United States, which rendered

the judgment of *Cummings & Styron* v. *Cannon*. We have every disposition to avoid even the appearance of a conflict with the tribunals of the United States created under the constitution, and we have no disposition to quibble between restraining processes and restraining persons from proceeding under them. But surely there is a substantial difference between undertaking to revise the judgment and procedure of a co-ordinate or even superior tribunal, and interfering to restrain parties from acts not authorized by our equals or superiors. It does not impugn in any respect the judgment of the federal tribunal, that we interpose to prevent parties under our control from abusing the process of that court. It has granted a judgment against Cannon, and we make no offer to restrain the execution of their judgment from the estate of Cannon. But we do not perceive that, under a judgment against Cannon, the estate of Howard or any other person can be legitimately seized and sold. The judgment of Cummings & Styron is left intact, and we simply determine that they or their agent had no authority to seize the property of a stranger under pretense of its operation. To determine otherwise would be to adjudge that a plaintiff in execution against a pauper might obtain satisfaction from any rich inhabitant of the state.

Ingraham v. *National Salt Co.*, 139 Fed. 684 (E. D. N. Y., 1905), Aff. 143 Fed. 805 (1906). There a suit by attachment against real estate was begun in the federal court in New York. Later a receivership action was begun in the state court and the receivers sold the attached property. Afterward judgment was recovered in the federal court but the state court enjoined the marshal from making sale of the attached property. The federal court held that it would not enjoin the receivers from prosecuting their injunction suit because, the mere issuance of a writ of attachment not amounting to possession, the receivers had the prior actual custody of the real estate involved and, therefore, the prior right of disposition.

In *Twaits* v. *Penn. R. Co.*, 77 N. J. Eq. 103, 75 Atl. 1010 (1910), plaintiff sued for personal injuries in New

Jersey and the case was removed to the federal court where the defendant set up a release as a defense. Plaintiff then filed a second suit, this time in equity in the state court to enjoin the defendant from asserting the release as a defense on the ground that under the circumstances set forth in the bill it would be unfair and inequitable for the defendant to set up the release. The defendant contended that the New Jersey Chancery Court was without jurisdiction because that of the federal court was exclusive. In denying this contention and in upholding the jurisdiction of the state court in equity the court said, l. c. 1012-13:

> Since the gravamen of this bill is that the railroad company, the defendant in the lawsuit pending in the other jurisdiction, is setting up as a defense a receipt claimed to operate as a release, which, under the circumstances alleged in the bill, it is charged it is inequitable for it to do, I find that there is no principle of comity or public policy which forbids this court from passing upon the equitable claims of the complainant, and exercising whatever of its jurisdiction it finds proper under the circumstances. My opinion is that this would be so even if the action at law were pending in one of the courts of a sister state; therefore, *a fortiori*, would it be true where the suit at law was pending in New Jersey and was removed by the defendant to the federal court, where, I assume, it could also have removed this equitable action had it seen fit to do so? The jurisdiction at law is not interfered with by this equitable action. Whatever jurisdiction the Circuit Court of the United States has power to exercise with respect to the action at law is left unimpaired, and is not taken over into this court in this action in any way. The sole thing sought by the complainant here is equitable jurisdiction over the defendant to prevent it from inequitable conduct. I entirely agree with the expression of the learned Chancellor as above expressed that there is no doubt or difficulty about the right of the exercise of the power of equity of its jurisdiction under such circumstances.

It therefore becomes necessary to investigate the equitable claims of the complainant for the purpose of seeing whether they are well grounded.

See also:

In re Dawley, 99 Vt. 306, 131 Atl. 847 (1926).

Marchant v. *Wannamaker*, 176 S. Car. 369, 180 S. E. 350 (1935).

The Home Insurance Co. v. *Howell*, 24 N. J. Eq. 238.

Akerly v. *Bilas*, 15 Wis. 401.

Brown v. *Trent*, 35 Okla. 164, 128 Pac. 895 (1912).

Fowler v. *Westerhoff Bros. Co.*, 104 Atl. 198 (1918) (N. J. Chancery).

Chicago, R. I. & P. Ry. Co. v. *Callicotte*, (8 Cir.) 267 Fed. 799 (1920).

Many additional cases could be cited. The foregoing, however, clearly show that the state courts do not hesitate to enjoin the parties from proceeding in the federal courts or to enjoin the officers of those courts where the litigant does not have an equitable remedy in the federal court or where the federal remedy is not adequate. The circumstances under which such injunctions issue from the state courts are comparable to those under which they issue from the federal courts.

It may be that in earlier times some doubt was entertained respecting the right of state courts to enjoin parties from proceeding in Federal courts. If so that doubt has long since been resolved in favor of the right, on which this court recently placed it stamp of approval in *Princess Lida* v. *Thompson et al., Trustee*, 305 U. S. 465 (1938). There the trustees under a trust filed an account in the Common Pleas Court of Fayette County, Pennsylvania, which, in the absence of exceptions, was confirmed. Five years later a second partial account was filed in the same court by the two surviving trustees. On the following day two of the beneficiaries brought suit in equity

against the two surviving trustees and the administrators of the deceased trustee in the District Court for the Western District of Pennsylvania alleging mismanagement of the trust, praying that the trustees be removed and that the defendants account for and repay the losses of the trust. The trustees moved to dismiss the bill in the federal court for lack of indispensable parties and because the state court had exclusive jurisdiction. The federal court over-ruled the motion and ordered the defendants to answer, reserving the question of jurisdiction. Upon the petition of the trustees the state court enjoined the beneficiaries from prosecuting the action in the federal court and this was affirmed by the Pennsylvania Supreme Court. Meanwhile the federal court had enjoined the trustees from further prosecuting the injunction proceedings in the state court and proceeded to try the case. On certiorari to the Supreme Court of Pennsylvania this court held that the Pennsylvania Court acquired a prior jurisdiction in equity by virtue of the filing of the accounts and was in a position enabling it to give complete relief and, therefore, the District Court for the Western District of Pennsylvania was without jurisdiction of the subsequent equity suit brought to secure the same relief which the state court was already in a position to afford, and could and should be enjoined. This court said, l. c. 465-466:

> Certain it is, therefore, that if both courts were to proceed they would be required to cover the same ground. This of itself is not conclusive of the question of the District Court's jurisdiction, for it is settled that where the judgment sought is strictly *in personam*, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as *res judicata* in the other. On the other hand, if the two suits are *in rem*, or *quasi in rem*, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought the

> jurisdiction of the one court must yield to that of the other. We have said that the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction, the court must control the property. The doctrine is necessary to the harmonious cooperation of federal and state tribunals.

And further said, l. c. 467:

> The Common Pleas Court could not effectively exercise the jurisdiction vested in it, without a substantial measure of control of the trust funds. Its proceedings are, as the court below held, *quasi in rem*, and the jurisdiction acquired upon the filing of the trustees' account is exclusive. The District Court for the Western District of Pennsylvania is without jurisdiction of the suit subsequently brought for the same relief, and the petitioners were properly enjoined from further proceedings in that court.

It would of course be wrong to say that the courts of the state and nation have the unrestricted right each to enjoin parties from proceeding in the other. It would be equally wrong and equally unreasonable to say that they cannot do so under any circumstances. There is a well recognized intermediate ground in which either may, as the law now stands, properly do so. It will not promote the ends of justice to so far impair the power of the national courts to administer equity as to say that while under proper circumstances the state courts may enjoin parties from proceeding in them, they, on the contrary, cannot in any event restrain parties from proceeding in state tribunals. Especially is this true where as we have shown in respondent's original brief this Court has repeatedly said that Congress entertained no such intention in enacting Section 265 of the Judicial Code.

STATE COURTS ENJOIN PARTIES FROM PROCEEDING IN OTHER STATE COURTS UNDER CIRCUMSTANCES SIMILAR OR COMPARABLE TO THE FACTS OF THE PRESENT CASE.

State courts readily enjoin their citizens from prosecuting actions in the courts of sister states where sufficient grounds are shown for the interposition of a court of equity as where the party seeking the injunction will be subjected to fraud or oppression, where the purpose of the foreign suit is to secure some unfair advantage under the law or the facts or where, as here, one of the parties is attempting to re-litigate in another jurisdiction issues already settled in equity by the enjoining court. See, 32 C. J., Sec. 137, pp. 115 *et seq.* Great numbers of cases have applied this principle.

In *O'Haire* v. *Burns*, 45 Colo. 432, 101 Pac. 755, 131 Am. St. Rep. 191, 25 L. R. A. (N. S.) 267 (1909), O'Haire had originally sued Burns and others in equity asking that he be decreed the owner of a one sixth interest in certain mining properties pursuant to the terms of what appears to have been a "grub stake" contract. Burns prevailed and O'Haire was adjudged to have no interest, the decree being affirmed by the Colorado Supreme Court. Afterward while Burns was in Iowa on business O'Haire sued him there at law for $300,000 damages. Burns then brought a second equity suit in Colorado setting up the facts and alleging that O'Haire sought in the Iowa suit to relitigate issues previously disposed of by the Colorado court and asked that O'Haire be enjoined from prosecuting the Iowa suit. A demurrer to the complaint was over-ruled and the defendant elected to stand on it. A final decree was entered below and the preliminary injunction made permanent. On appeal the Colorado Supreme Court affirmed the decree below and said, 101 Pac. l. c. 757-8:

> We have no doubt but that Mr. Burns could have pleaded in the Iowa action the former litigation in this state and the result thereof as a complete de-

fense, and, if established by proper evidence, it would have received the full faith and credit by the Iowa court to which it is entitled under the Constitution of the United States, but why compel him to go over 500 miles to a foreign jurisdiction from that in which both parties reside, or from where the original cause of action, if any, accrued, from where the property over which the original contention arose was situate, and from where all the witnesses reside, in order to present these facts to a foreign tribunal? We have been furnished with no principle of law or equity nor process of sound reasoning why this should be done and are of the opinion none can be presented. Besides, if O'Haire is allowed to continue his Iowa suit, and is defeated, under this same rule he could, if aided by persons with means, bring another action in some other state wherever perchance he might secure personal service upon Mr. Burns and thus compel him to again defend the same action with at least the plea and proof of *res judicata* and so continue without any redress. The fallacy of the statement is itself an answer to it. This method of equitable relief appears to have been approved by the great weight of authorities, and, for answer to the able argument of counsel against it, we refer to the reasons assigned in support thereof in the following cases: *Cole* v. *Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538; *Cunningham* v. *Butler*, 142 Mass. 47, 6 N. E. 782, 56 Am. Rep. 657; *Butler* v. *Goreley*, 146 U. S. 313, 13 Sup. Ct. 84, 36 L. Ed. 981; *Pickett* v. *Ferguson et al.*, 45 Ark. 177, 55 Am. Rep. 545; *Engel* v. *Scheuerman*, 40 Ga. 206, 2 Am. Rep. 573; *Dehon et al.* v. *Foster et al.*, 4 Allen (Mass.) 545; *Hawkins* v. *Ireland*, 64 Minn. 339, 67 N. W. 73, 58 Am. St. Rep. 534; *Field* v. *Holbrook*, 33 Abb. Prac. (N. Y.) 377; *Kittle* v. *Kittle*, 8 C. P. Rep. (N. Y.) 72; *Vermont & Canada R. R. Co.* v. *Vermont Cen. R. R. Co. et al.*, 46 Vt. 792; *Gage* v. *Riverside Trust Co.*, (C. C.) 86 Fed. 984; *Kempson* v. *Kempson*, 63 N. J. Eq. 783, 52 Atl. 360, 625, 58 L. R. A. 484, 92 Am. St. Rep. 682; *Haze & Quimby* v. *Lyndonville Nat. Bank et al.*, 70 Vt. 543, 41 Atl. 1046, 67 Am. St. Rep. 680; *Kendall* v. *Coke Co.*, 182 Pa. 1, 37 Atl. 823, 61 Am. St. Rep. 688; *Hager* v. *Adams*, 70 Iowa 746, 30 N. W. 36; *Dinsmore* v. *Neresheimer*, 32 Hun. 204.

Except for the matter of geographical distance between Colorado and Iowa we do not believe that the case at bar can be distinguished from *O'Haire* v. *Burns*. We do not believe that distance was the determinative element in that case. As the Court says, *res judicata* could be pleaded but that would not prevent the bringing of still another suit and another and another. Here, if Toucey through Shay can maintain his suit at law in Missouri, why can he not maintain it in any other state, and again and again? If distance is the test, what is a reasonable distance? No case we know of holds that distance is the test.

For a very similar case and the same ruling see *Life Insurance Co.* v. *Fisher*, 5 Tenn. Civ. App. 232 (1915) (Affirmed without opinion by Tenn. Sup. Ct., 1915). The only difference between that case and *O'Haire* v. *Burns*, *supra*, is that in *Life Insurance Co.* v. *Fisher* the original action in Tennessee appears to have been at law to collect the proceeds of a policy as was the subsequent action filed by the same plaintiff in Mississippi. The Tennessee court enjoined Fisher from prosecuting the suit in Mississippi after he had been defeated in Tennessee and upon his proceeding to do so punished him for a contempt. The appellate Court affirmed this action below.

The rule is stated in 32 C. J. 117, as follows:

> Where a controversy between residents has been determined by the courts of the state, and, while one of the parties is temporarily in a sister state, an action is commenced against him there by the adverse party, involving matters previously determined, an injunction will be granted restraining the adverse party from prosecuting the suit in the sister state.

The same essential principle is applied to different facts in *State ex rel. N. Y., C. & St. L. R. Co.* v. *Norton*, 321 Mo. 764 (*en banc*), 55 S. W. 2d 272 (1932). A citizen of Indiana, the administratrix of her deceased husband's estate,

sued the railroad in Missouri under the Federal Employers' Liability Act for damages for his death which occurred in Indiana. The railroad secured an injunction in Indiana against the prosecution of the Missouri suit notwithstanding which she pressed it to judgment. The railroad then moved the Indiana court to issue a citation for contempt against her which was done. Thereupon the Missouri circuit court enjoined the railroad from prosecuting the citation and the latter petitioned the Missouri Supreme Court for a writ of prohibition prohibiting the circuit court from entertaining jurisdiction of the injunction proceeding against it. The court made absolute the provisional rule in prohibition theretofore issued saying, l. c. 273:

> It is settled law that, in a proper case, a court of equity having jurisdiction of the person may enjoin such person from prosecuting a suit in a foreign jurisdiction. By a "proper case" we mean that the party seeking such an injunction must make a clear showing that it would be *inequitable, unfair and unjust to permit the prosecution of the suit in a foreign jurisdiction* (italics ours).

And further said, l. c. 274:

> The Indiana court had jurisdiction to enjoin Lena C. Meek, administratrix, from prosecuting her suit in the St. Louis circuit court, and to adjudge her in contempt for proceeding with the prosecution of that suit in violation of the injunction. If, as we have held, the decree of the Indiana court enjoining the prosecution of the suit in the St. Louis circuit court was a valid decree, the railroad company, being an interested party, was entitled to institute any lawful proceeding looking to the enforcement of that decree. * * * The contempt proceedings were instituted by the railroad company. When these proceedings were instituted, the jurisdiction of the court, as well as the right of the railroad company to prosecute the proceedings to a termination, at once attached. It is familiar law that, where the jurisdiction of a court and the right of a party to prosecute the proceedings

therein have once attached, that right cannot be arrested or taken away by proceedings in another court. *Stevens* v. *Central National Bank of Boston*, 144 N. Y. 50, 39 N. E. 68. For this reason the St. Louis circuit court did not have jurisdiction to enjoin the railroad company from prosecuting the contempt proceedings in the Indiana court.

It is significant, and a review of the cases will show, that it is typical of the attitude of the state appellate courts that the Missouri Supreme Court did not countenance the attempt of the St. Louis Circuit Court to create a stalemate in the litigation by enjoining the railroad from prosecuting the contempt action. The exercise of the power of injunction in this field has not produced the discord or the conflict between courts or the stalemate in litigation which some members of this court may have been led to fear. The reason is that such injunctions issue only in exceptional cases and then only in accordance with well defined and well recognized principles of law, so that as far as can be judged from reading the reports, the courts in which the parties have upon established principles been enjoined from proceeding, do not take the attitude that their powers have been interfered with by the enjoining courts. Federal courts have been as careful in this respect as have the state courts. The cases lend no support to the theory that the established exceptions to the application of Section 265 of the Judicial Code lead to conflict between the courts of the states and nation.

The subsequent history of *State ex rel. N. Y., C. & St. L. R. Co.* v. *Nortoni, supra*, is interesting and sheds further light upon this subject. After the Missouri Supreme Court had prevented the lower court from interfering with the prosecution by the railroad of the contempt proceedings against the plaintiff below whose name was Meek, her Missouri attorneys had one Maude J. Hamilton, an employee in their office, appointed ancillary adminis-

tratrix in Missouri of the estate of the deceased. Mrs. Meek, the Indiana administratrix, dismissed her Missouri action and Maude J. Hamilton as Missouri administratrix brought a new action against the railroad in Missouri. The railroad then brought an injunction suit against various attorneys, a notary public and certain witnesses to prevent the taking of testimony in Indiana in the Hamilton suit. In *New York, C. & St. L. R. Co.* v. *Perdue*, 97 Ind. App. 517, 187 N. E. 349 (1933), the appellate Court of Indiana, *en banc*, reversed the order of the lower court which refused to issue the injunction and directed that it issue, saying, l. c. 351:

> We are not unmindful of the rule that, on grounds of comity, the power of one state to interfere with a litigant who is in due course pursuing his rights and remedies given under the law, in the courts of another state, should be exercised sparingly. But we cannot lose sight of the fact in the instant case that the prosecution of the identical cause of action, when sought to be prosecuted by Lena C. Meek, the widow and sole beneficiary, in the state of Missouri, was enjoined in this state upon grounds of equity. If it was inequitable for Lena C. Meek, either individually or as such administratrix, to prosecute the said cause of action in Missouri, then upon what process of reasoning could it be maintained that it would not be inequitable for the said Hamilton to prosecute it in Missouri? It is true that the court entering the injunction against Meek had jurisdiction over her and that the trial court in the instant case has no jurisdiction over Hamilton. But it is not sought to make any order against Hamilton in the instant case. It is sought only to make an order against persons who are under the jurisdiction of the courts of our state, from assisting her in prosecuting her cause of action in Missouri. *Her action is manifestly an attempt to circumvent and annul the decision of a court of competent jurisdiction in our state.* As heretofore pointed out, that judgment is amply and fully supported by the decisions of our courts of final jurisdiction. The persons sought to be

> enjoined in the instant case are within the jurisdiction of our courts, and the attempt is clearly being made to use them to circumvent and annul and render impotent the judgments and law of this state. They should be enjoined from so doing. Every court of general jurisdiction has the inherent power to protect its valid orders and judgments from being so annulled (Italics ours).

The Court relied on its own prior cited decisions and on *Michigan, etc., R. R. Co.* v. *Mix*, 278 U. S. 492, 49 Sup. Ct. 207, 73 L. Ed. 470, and *Denver, etc., R. Co.* v. *Ben Terte*, 284 U. S. 284, 52 Sup. Ct. 152, 76 L. Ed. 295.

It seems to us that the *Perduie* case is in harmony with *Wonderly* v. *Lafayette County, supra*, and its principle is applicable here since the attempt is clearly being made to use the state court in the instant case "to circumvent and annul and render impotent the judgments and law" of the Federal District Court. On the same point see also *Sandage* v. *Studebaker Bros. Mfg. Co.*, 41 N. E. 380 (Indiana, 1895).

In *Kansas City Rys. Co.* v. *McCardle*, 288 Mo. 354, 232 S. W. 464 (1921), the railroad had been harassed by the defendant McCardle, a lawyer who had made a practice of bringing suits in the State of Kansas on behalf of certain installment credit companies against the railroad's employees who lived in Missouri and running garnishments against the railroad requiring the impounding of the employees' wages, although both the creditor and the railroad were citizens of Missouri. The object of the suits was alleged to be to evade the Missouri Statute which provided, in effect, that only 10% of the wages of a married man or the head of a family could be garnisheed in Missouri. The railroad brought an injunction suit against McCardle in the case of one Campbell, an employee whose wages had been garnisheed in Kansas, but also attempted to enjoin the defendant generally from bringing any such suits involving any of its employees. A demurrer

to this petition was sustained below and on appeal was affirmed by the Missouri Supreme Court on the ground that the railroad was not entitled to have an injunction generally against the bringing of subsequent suits on behalf of other employees; but the court also held that it would have been entitled to an injunction had it confined its action to the particular pending case involving the employee Campbell.

Quite a number of the state court cases rely on *Cole* v. *Cunningham*, 133 U. S. 107 (1889). There proceedings in insolvency were begun in a Massachusetts court against a man named Bird, under the local statute. Prior thereto a Massachusetts creditor of Bird, knowing that he had stopped payment and was insolvent and that he had money due him from a New York firm, assigned its claim to a citizen of New York (without consideration) and the latter brought suit in New York against Bird by attaching the New York debt. The Massachusetts Court enjoined the Massachusetts creditor from proceeding with the New York suit through the New York assignee. The injunction was attacked on the ground that it violated the full faith and credit clause of the Constitution. This court affirmed the Massachusetts decree and after reviewing the authorities at great length held that the injunction did not violate the full faith and credit clause of the Constitution. The court further found that the right of the equity courts of one state to prevent persons within their jurisdiction from the prosecution of suits in other states had been long established both here and under the principles of the English law.

Steelman v. *All Continent Corp.*, 301 U. S. 278 (1936), appears to us to be an application of essentially the same principle applied in *Wonderly* v. *Lafayette County, supra, New York, C. & St. L. R. Co.* v. *Perduie, supra,* and *Cole* v. *Cunningham, supra,* on which the Court in the *Steel-*

man case relies. While the action involved two Federal courts, the principle applied makes it pertinent here. There Steelman was trustee in bankruptcy in the District Court for the District of New Jersey of the property of William Fox who had been adjudged a bankrupt. Fox had set up a family corporation called "All Continent Corporation" which the trustee claimed he had used to divert property which was properly part of the bankrupt estate. All Continent Corporation had an account and securities in excess of one half million dollars with Sparks & Co. a brokerage house in Philadelphia. All Continent brought suit against Sparks in the District Court of the Eastern District of Pennsylvania to establish its title to the account as against the claim that the account was really the property of Fox. The trustee in bankruptcy was made a party. Thereupon the trustee secured from the District Court in New Jersey an order staying the prosecution of the Pennsylvania suit. On appeal the 3rd Circuit held (86 F. 2d 913) that "the Pennsylvania court, having first acquired jurisdiction of the property and controversy, is entitled to exclusive jurisdiction, and the institution of the suit in chancery was an attempt to oust the Pennsylvania court of the jurisdiction which it had previously and validly acquired," adding that the Pennsylvania court could restrain the trustee from litigating the issue elsewhere. This court reversed the 3rd Circuit and affirmed the decree of the district court, ruling, in effect, that the Bankruptcy Court under all the circumstances was better able to administer full justice. It relied on Sec. 262 of the Judicial Code (28 U. S. C., Sec. 377), giving the United States courts power to issue all writs not provided for by statute necessary for the exercise of their jurisdictions and agreeable to principles of law. Respondent's argument was that in the Pennsylvania suit the court had custody of the *res*, namely, the securities held by Sparks & Co. in Philadelphia and that its possession of that *res* should not be interfered

with. Answering this argument Mr. Justice Cardozo said, l. c. 290:

> The argument misconceives the grounds upon which the trustee looks to us for aid. The trustee does not challenge the jurisdiction of the federal court in Pennsylvania, if the word jurisdiction be taken in its strict and proper sense. Cf. *Straton* v. *New*, 283 U. S. 318, 321; *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 737, 738. He is not seeking a writ of prohibition directed to the court itself. He is not seeking an injunction to vindicate his exclusive control over a *res* in his possession, or in the possession, actual or constructive, of the court that appointed him. *Isaacs* v. *Hobbs Tie & Timber Co., supra; Murphy* v. *John Hofman Co.*, 211 U. S. 562, 568, 569; *Moran* v. *Sturges*, 154 U. S. 256, 274. What he seeks is an injunction directed to a suitor, and not to any court, upon the ground that the suitor is misusing a jurisdiction which by hypothesis exists, and converting it by such misuse into an instrument of wrong. *Gage* v. *Riverside Trust Co.*, 86 Fed. 983, 998, 999; *Higgins* v. *California Prune & Apricot Growers*, 282 Fed. 550, 557; *Cole* v. *Cunningham*, 133 U. S. 107, 112, 117, 118. Suits as well as transfers may be the protective coverings of fraud. *Shapiro* v. *Wilgus*, 287 U. S. 348, 355. We are unable to yield assent to the statement of the court below that "the restraint of a proper party is legally tantamount to the restraint of the court itself." The reality of the distinction has illustration in a host of cases. 2 Story, Eq. Jur., 14th Ed., Sec. 1195; 5 Pomeroy, Eq. Jur., Sec. 2091; *Cole* v. *Cunningham, supra; Madisonville Traction Co.* v. *Mining Co.*, 196 U. S. 239, 245; *Kessler* v. *Eldred*, 206 U. S. 285; *Rickey Land & Cattle Co.* v. *Miller & Lux*, 218 U. S. 258; *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 426; *Smith* v. *Apple*, 264 U. S. 274, 279. Cf. Judicial Code, Sec. 265; 28 U. S. C., Sec. 379; *Brown* v. *Pacific Mutual Life Ins. Co.*, 62 F. 2d 711, 713; *Chicago Title & Trust Co.* v. *Fox Theatres Corp.*, 69 F. 2d 60, 61, 62.

Applying *Steelman* v. *All Continent Corp.* here, the ground of the injunction in the present case is not

only that petitioner through his assignee is seeking to relitigate issues already decided by a court of equity but that respondent is misusing the jurisdiction of the Missouri court "and converting it by such misuse into an instrument of wrong." It cannot be said that this is an attempt to control the Missouri court and thus will lead to a conflict of courts since Justice Cardozo particularly points out that the restraint of the party is not legally tantamount to a restraint upon the court.

This Court said the same thing in *Marshall* v. *Holmes*, 141 U. S. 589 (1891), l. c. 599:

> While it (the federal court) cannot require the state court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would *operate directly upon him*, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a state court. It would simply take from him the benefit of judgments obtained by fraud.

The *Steelman* case affords an interesting contrast to *Princess Lida* v. *Thompson*, *supra*, 305 U. S. 465. In the latter this court, in resolving the jurisdictional issue in favor of the state court, laid some stress upon the fact that the action was *quasi in rem*. In the former the *res* was within the jurisdiction, and by reason of the action was within the custody of the District Court of the Eastern District of Pennsylvania but all of the equities of the situation preponderated in this Court's opinion in favor of the prior jurisdiction of the Federal Bankruptcy Court in New Jersey, even though Sparks & Co. was not a party to that proceeding. The case shows that there is no special magic in a *res* or in the custody of a *res*. It is only where that custody gives the court a peculiar right of priority that the existence of a *res* has weight. It is

merely *one* of the elements the court takes into account in adjudging equitable rights, and may be outweighed by other considerations.

Toledo Scale Co. v. *Computing Scale Co.*, 261 U. S. 399 (1923), affords an interesting comparison with the *Steelman* case, *supra*, and *Princess Lida* v. *Thompson*, *supra*. In the *Toledo Scale Co.* case one Federal court enjoined the prosecution of a subsequent suit in another Federal Court which represented an attempt to re-litigate issues decided in equity by the first Court. No *res* was involved in either court and upon the authority of Section 262 of the Judicial Code this court held that the Federal court in which the decree was obtained properly enjoined the Toledo Company from interfering with the execution of its decree by prosecuting the subsequent suit.

American courts have universally recognized the desirability of terminating litigation when the issues have been finally adjudged and have many times expressed this principle of public policy. Chief Justice Taft, speaking for this court, said in the *Toledo Scale Co.* case, *supra*, l. c. 425:

> As Mr. Justice Story remarked in *Ocean Insurance Co.* v. *Fields*, 2 Story 59, 18 Fed. Cas. 532, "It is for the public interest and policy to make an end to litigation, or, as was pointedly said by a great jurist, that suits may not be immortal, while men are mortal."

Two other expressions by this court are pertinent upon the same principle. Mr. Justice Roberts said in *Baldwin* v. *Iowa State Travelling Men's Association*, 283 U. S. 522 (1931), l. c. 525:

> Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled

> as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.

Mr. Justice Reed tersely stated the same thing in *Treinies* v. *Sunshine Mining Co. et al.*, 308 U. S. 66 (1939), saying, l. c. 78:

> One trial of an issue is enough.

A member of this court inquired at the original argument why respondent's remedy was not adequate by pleading the decree of the district court in bar of the state court suit, and suggested that if the Supreme Court of Missouri refused to honor the plea this court would exercise its power of review by certiorari. Since the identity of issues between the pending state court suit and that concluded by the decree below has never been denied, the public interest in terminating this litigation requires that the matter be now concluded by affirming the relief granted respondent below. Is it just or proper that in order ultimately to prevent this attempt to relitigate the same issues decided by the Federal court, respondent should be put to its defense in the State court, subjected to a probable appeal, and then have to rely in the final outcome upon the *discretionary* power of this Court either to grant or refuse a petition for certiorari to obtain a ruling on what is not disputed, namely, that the issues in the two courts are, in fact, identical? We submit that it is not.

THE ENGLISH CASES ARE IN ACCORD WITH THE AMERICAN RULE.

The English chancery courts have often recognized and applied the principle that they have and should exercise the power to enjoin English citizens from prosecuting suits in other jurisdictions, the effect of which

was to relitigate issues previously determined by the English courts. Thus, in *Wedderburn* v. *Wedderburn*, 2 Beavan 208 (1840), a suit was instituted in England by persons beneficially entitled to the estate of David Webster against his surviving partner and persons who had succeeded them in the business. It sought participation in the profits which had been made in the partnership business from the death of Webster in 1801 to 1840. The case was heard by the Master of the Rolls and a decree entered for the plaintiffs which was afterward affirmed by the Lord Chancellor. While the parties were taking the necessary accounts under the Master's decree, plaintiffs commenced proceedings in the Court of Session in Scotland against several of the defendants who had heritable property there, the object of which was to obtain the Scotch process of inhibition and arrestment by which, in the very early stage of the suit, the pursuer acquires a lien on all the heritable property of the defendant for whatever he may eventually recover. The process, being recorded, operated as notice to all future purchasers and mortgagees so that in effect the defendant from the beginning of the suit was restrained from dealing with his property. The proceedings were in respect of the same demands as were the subject of the suit in England. The defendants moved that plaintiffs be restrained by injunction from prosecuting the Scotland suit or any other suit. The Master of the Rolls granted the injunction, saying that the court had jurisdiction to interfere in a case of this nature and that it was a proper case. He said, l. c. 214: "the rule of the Court is, that there is not to be a double investigation of the same matter upon which the Court is to adjudicate." He, however, pointed out that there might be special circumstances under which a party might be at liberty to proceed in a foreign country, such as where the defendants have no available property in England, or are insolvent, or some other special reason why a plaintiff ought to be permitted an auxiliary remedy; but he pointed out, even in such a case, the

party ought first to apply to an English court for permission to adopt such proceedings. On appeal of the case, the Lord Chancellor affirmed the principle laid down by the Master, but on application by the plaintiffs, gave them leave to proceed in Scotland so far only as might be necessary to obtain security for what might be found due in the English suit. He said (4 Myl. & C. 584, l. c. 595):

> * * * I am of opinion that the order of the Master of the Rolls is quite right. There can be no doubt that the general rule precludes parties from proceeding in any other court for the same purpose for which they are proceeding in this court, whether the other proceedings are taken in this or in any other country; and if the party conceives there are any circumstances in his case which constitute an exception to the rule, I think that his proper course is, not to take proceedings in another court, of his own authority but to apply to this court for permission to take such proceedings.

In *Beckford* v. *Kemble*, 1 Sim. & St. 7, the English court was moved on behalf of Beckford for an injunction to restrain the defendants from all proceedings in a suit instituted by them in the Chancery court in Jamaica against plaintiff and from all other proceedings in said country against plaintiff for the foreclosure and sale of the plantations in question. The foreclosure suit had been begun in Jamaica after a decree in an English court had been rendered upon the plaintiff's bill for an accounting, an ascertainment of the amount of the mortgage debts, and redemption. The Vice-Chancellor granted the injunction, saying, l. c. 17:

> All the parties are in England; and it is plain therefore that the accounts can much more conveniently, as well as more satisfactorily, be taken here than in Jamaica. It appears to me that the plaintiff in this court has a clear equity to be protected against a double account of the amount due on the mortgages.

In *Oakley* v. *Ramsey*, 27 L. T. 745, A sued in England for specific performance of a contract for the lease to him of a Scotch moor which the owner, in violation of the contract, had leased to a third party. The owner of the moor then began an action in Scotland for the rescission of the lease. The English court enjoined the owner from proceeding with the Scotch action.

Tredigar v. *Windus*, 44 L. J. Ch. 268; L. R. 19 Equity 607; 32 L. T. 596; 23 W. R. 511, holds that the right to plead a prior equity decree in defense of an action at law does not prevent the court of equity from granting an injunction against the prosecution of the law action. There both actions were in the English courts.

Carron Iron Co. v. *MacLaren*, 5 H. L. Cas. 416, 24 L. J. Ch. 620, 3 W. R. 597, holds that if the circumstances of a case are such as would make it the duty of a court of equity in England to restrain a party from instituting proceedings in another English court the same circumstances will also warrant it in imposing a similar restraint upon him with regard to proceedings in a foreign court.

It therefore appears that the English courts apply substantially the same principles in substantially the same manner and reach the same result as our own state and federal courts in determining when a court of equity will enjoin the prosecution of proceedings in another court or jurisdiction.

DIAL V. REYNOLDS, 96 U. S. 340, DISTINGUISHED.

In the first argument of this case one of the Justices inquired why *Dial* v. *Reynolds* is not exactly in point. It was not possible to answer the question because we did not remember the case.

There Dial, as successor trustee, filed a bill to foreclose a deed of trust executed by one Cooper to secure certain liabilities to Staatsman. Reynolds claimed title

to the real estate adversely to Cooper. Dial's bill, besides foreclosure, asked to quiet the title of the trustee as against Reynolds and to remove the cloud of Reynold's claim and to enjoin him from further prosecuting an action in ejectment he had previously brought. This court held that the trial court correctly dismissed the bill for misjoinder since the plaintiff was attempting to dispose of two separate causes of action against two different parties in the same suit. The court indicated that the statute in question here forbade the injunction asked, saying, l. c. 341:

> Such an injunction, except under the Bankrupt Act, no court of the United States can grant. With this exception, it is expressly forbidden by law.

By the court's "such an injunction" it is fairly to be inferred that the court meant an injunction against one who was not a party to the deed of trust and claimed adversely to the mortgagor, the mortgagee and the trustee. The statement should be read in the light of the facts before the court, and the circumstance that no attempt was being made to relitigate issues previously adjudged. If that is not what the court meant, then the statement is in conflict with the subsequent rulings on the subject.

This court has cited *Dial* v. *Reynolds* only four times, as follows: *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175 (1920), l. c. 182 (see Respondent's Brief, page 37). There the court said, after quoting Section 265 of the Judicial Code:

> Is the suit one to stay proceedings in a state court in the sense of that provision? If it is, the District Court erred in not dismissing the bill on that ground. *Haines* v. *Carpenter*, 91 U. S. 254; *Dial* v. *Reynolds*, 96 U. S. 340; *United States* v. *Parkhurst-Davis Co.*, 176 U. S. 317. If it is not, the court rightly entertained the suit and proceeded to an adjudication of the merits, for the citizenship of the parties and the amounts in controversy were within the jurisdictional requirements.

The court, in the *Wells Fargo* case, then held that the suit was not within the prohibition of the statute and that the injunction against prosecuting the state court proceeding was properly granted.

Providence & N. Y. S. S. Co. v. *Hill Mfg. Co.*, 109 U. S. 607 (1883), was a limitation of liability proceeding in admiralty and this court held that that proceeding superseded any state court action. *Dial* v. *Reynolds* was cited in the dissenting opinion.

In *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322 (1906), l. c. 338, where an injunction was granted against the prosecution of a state court action, the court merely said that *Dial* v. *Reynolds* and other cases cited did not sustain the appellant's contention without stating why.

In *Hull* v. *Burr*, 234 U. S. 712, l. c. 723, this court, after citing *Dial* v. *Reynolds* and other cases for the statement that the prohibition of the statute against injunctions to state court proceedings has been customarily observed, proceeds as follows:

> It is recognized, however, that Section 720 was not intended to limit the power of the Federal courts to enforce their authority in cases that on other grounds are within their proper jurisdiction; and hence, it has been held that, in aid of its jurisdiction properly acquired, and in order to render its judgment and decrees effectual, a Federal court may restrain proceedings in a state court which would have the effect of defeating or impairing such jurisdiction. *French, Trustee,* v. *Hay*, 22 Wall. 250; *Dietzsch* v. *Huidekoper*, 103 U. S. 494, 497; *Julian* v. *Central Trust Co.*, 193 U. S. 93, 112; *Traction Co.* v. *Mining Co.*, 196 U. S. 239, 245.

It seems clear, therefore, that in the subsequent cases this court has in no sense repudiated *Dial* v. *Reynolds* but has merely held that its ruling does not apply to cases like the present one. This is apparent. No attempt was being made there to relitigate issues already decided by a Federal equity court.

CONCLUSION.

By the time the Court reaches this "Conclusion" it will have read both Respondent's Brief and Respondent's Supplemental Brief and will, therefore, have reviewed many of the principal cases in the United States declaring and applying the principle of law before the Court for review. It will, therefore, be apparent that the Court is not here dealing with a peculiar abuse of federal power contrary to the statute, or with an attempt by the national courts to supervise or control the state courts, or with a principle in any sense peculiar to or even originated by the national courts. On the contrary it has before it for review the invocation by the District Court of a principle of universal application both here and in England. Given the situation presented by the facts in this case a Federal court will enjoin the parties from proceeding in a state court; it will enjoin the parties from proceeding in another Federal court; and a state court will enjoin the parties from proceeding in the Federal courts or from proceeding in another state court or from proceeding in another court of the same state. Likewise an English court will enjoin the parties from proceeding in another English court or a court of a foreign country.

When, therefore, the question examined is not merely "what have the federal equity courts done?" but "what have *all* Anglo-Saxon courts done when faced with an attempt to litigate elsewhere issues already adjudged in equity?", it becomes apparent that this court has really construed Section 265 of the Judicial Code so as not to exclude a remedy which every co-ordinate court possesses and exerts, a remedy which the national courts also possess by the express provisions of Section 262. To construe Section 265 otherwise would be to construe it to deprive the national courts of a fundamental equitable power of which it is unreasonable to suppose that Congress intended to deprive them. It is equally clear that the exercise of this power does not foster conflicts be-

tween the courts but that, on the contrary, it is essential to prevent conflicts. It is invoked only in the interests of justice; and justice is what the courts, state or national, are intended to dispense.

It is also clear that the exercise of the power has not been limited in any courts to actions *in rem* but that on the contrary, the existence of a *res* is merely one equitable circumstance influencing judicial action. If the justice of the situation requires, one court not having the custody of a *res* will enjoin the parties from proceeding in another which does have its custody (*Steelman* v. *All-Continent Corp., supra*).

In closing we respectfully request the court to bear this further observation in mind. At the time when this statute (Section 265) was first enacted (1793), as is well known, the states were acutely apprehensive that the Federal power, including the power of the federal courts, might be exerted in a manner detrimental to and derogatory of the co-existing powers of the states and of the state courts. It is fairly inferable that many states feared that the federal courts might attempt improperly to interfere with the lawful and orderly processes of the state courts and prevent them from exercising their proper jurisdiction. At the same time we do not see how it can be properly assumed that Congress intended to prevent the federal courts from exercising those characteristic powers which *all* courts of a similar character then possessed by reason of their inherent nature. One of those powers which had long existed in English courts of equity, as we showed in Respondent's Brief, was the power to protect and effectuate the courts' own decrees. We do not believe that there is any just ground for saying that it was the intent of Congress to strip the federal courts of this essential, inherent power merely in the one aspect of its exercise in which the federal courts might come in contact with litigants in the state courts. The exercise of power in this instance in no way inter-

feres with the state courts' concurrent and coordinate jurisdiction. It is not the exercise of a power which the state court itself will not readily exercise in limiting litigants who seek to relitigate in the federal courts issues already determined in other courts, federal, state or foreign. We trust that the court will differentiate between the case at bar and other cases now before it in which the power of injunction to stay proceedings in state courts has been exercised in other circumstances where, it may be, the right to do so is neither so well defined as in the present case, nor so manifestly in the interests of justice and equity.

We are convinced that this Court will not proceed upon a tangent which would throw it out of harmony with all the other courts of the Anglo-Saxon world. The decree below should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 16.

SAMUEL R. TOUCEY, PETITIONER,

VS.

NEW YORK LIFE INSURANCE COMPANY,
A CORPORATION, RESPONDENT,

RESPONDENT'S PETITION FOR REHEARING.

SAMUEL W. SAWYER,
RICHARD S. RIGHTER,
HORACE F. BLACKWELL, JR.,
Attorneys for Respondent.

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 16.

SAMUEL R. TOUCEY, PETITIONER,

VS.

NEW YORK LIFE INSURANCE COMPANY, A CORPORATION, RESPONDENT.

RESPONDENT'S PETITION FOR REHEARING.

Now comes respondent, New York Life Insurance Company, and respectfully petitions this court to grant a rehearing in this cause for the reason that this court, in reversing the decree below, has overlooked or disregarded important and controlling considerations of law duly presented in Respondent's Brief and Supplemental Brief.

1. In construing Section 265 of the Judicial Code (28 U. S. C. A., Sec. 379; R. S., Sec. 720) to prohibit an injunction in a "relitigation" case, this court has overlooked or disregarded the prevailing principle uniformly applied by all other courts to adjust and preserve by injunction rights acquired under equity decrees.

Thus it is that state courts may enjoin another court of the same state, or another court of a sister state (32

C. J., Sec. 137, p. 115; *O'Haire* v. *Burns*, 45 Colo. 432, 101 Pac. 755; *Life Ins. Co.* v. *Fisher*, 5 Tenn. Civ. App. 232; *New York C. & St. L. R. Co.* v. *Perduie*, 97 Ind. App. 517, 187 N. E. 349), or a federal court (*Reagan* v. *Dick*, 233 Pac. 159 (Colo.); compare *Princess Lida* v. *Thompson*, 305 U. S. 465) from relitigating issues already decided. Likewise, a federal court may enjoin another federal court from relitigating that which has been adjudged in equity (*Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399; compare *Steelman* v. *All Continent Corp.*, 301 U. S. 278). But now this Court has said that, unlike all other courts, a federal court may not enjoin a state court from passing second judgment on what the federal equity court has previously determined, although as between every other court such a procedure is deemed inequitable and an unjust hardship—more than a mere "inconvenience"—upon the winning party in the first suit.

The legislative history of Section 265 and the numerous cases in this court construing and applying it do not justify a construction of Section 265 which subordinates the jurisdiction of a federal court to that of a state court. But even if this court had never heretofore considered Section 265, that section should not be construed to render nugatory and futile the efforts of the litigants and the trial court, and to deprive the trial court of the power to declare and enforce upon the losing party what it, in the full exercise of its admitted equity jurisdiction, has solemnly decided. Surely that is not a "part of the delicate adjustments required by our federalism."

The practical effect of this court's construction of Section 265 is to restrict the statutory right of a party to invoke federal jurisdiction by original suit or upon removal, thereby greatly discouraging litigation in the federal courts. Now a litigant, otherwise entitled by the Acts of Congress to do either of these things, will hesitate to exercise these rights because this court has said that, after expensive and protracted litigation there, he will

find that the decree for which he has so arduously fought is worth nothing in determining his rights, except as a basis for a plea of *res judicata*. The loser may, either himself or by employing a fraudulent assignment and disregarding entirely the federal court litigation and the questions settled by it, file the same suit in a state court and secure a retrial of the same issues without interference by the federal court. Thus the losing party has two or more "days in court," the result to the winner is as if the federal court proceedings had not taken place, and the state court may render a judgment against the winning party, thereby creating the anomalous situation of a party having one judgment in his favor and one against him, with his only recourse for relief an application to this court's discretion.

2. This court has given undue importance to the so-called legislative "withdrawals" from the "sweeping prohibition" of Section 265 and has given erroneous effect to *Kline* v. *Burke Construction Co.*, 260 U. S. 226.

a. Removal of actions. This court has held that the Removal Act, although passed in 1789, amended *pro tanto* the Act of 1793. An earlier statute cannot amend a later one. Nor is it an answer to say that the subsequent reenactments of the Removal Act have amended the Act of 1793. The language of the 1793 Act has never been changed. It is more logical and reasonable to say that since the Act of 1793 was not expressly amended by Congress to exclude from its prohibition injunctions against continued proceedings in state courts in removal cases, Congress, by reenacting the Removal Act, intended no withdrawal from the restrictions of the Act of 1793 by the language of the Removal Act.

Even if the Removal Act were enacted after the Act of 1793, the words "and shall proceed no further in the cause" are not a repeal *pro tanto* of Section 265. Nowhere in the Removal Act is the issuance of an injunction authorized; the state court is merely forbidden to

proceed. If Congress had intended any such result in the Removal Act and in the Shipowner's Limited Liability Act, would not Congress, in reenacting Section 265 in the Revised Statutes of 1874, have expressly excepted these cases from the limitation of the statute as it did with respect to bankruptcy matters?

This court now explains *French* v. *Hay*, 22 Wall. 250; *Dietzsch* v. *Huidekoper*, 103 U. S. 494, and *Madisonville Traction Co.* v. *Saint Bernard Mining Co.*, 196 U. S. 239, on the ground that the Removal Act of 1789 amended *pro tanto* the Act of 1793. None of these cases intimates that, and this court has never heretofore said that. Justice Harlan said in the Madisonville case that it had been "settled by former adjudications" that it was competent for the district court "without violating Section 720 of the Revised Statutes" to restrain the party against whom a cause had been legally removed from taking further steps in the state court. Why? To protect the exclusive jurisdiction of the federal courts from interference by state court proceedings. So this court has repeatedly said until now. But in 1933 two Harvard law students (Taylor and Willis, The Power of Federal Courts to Enjoin Proceedings in State Courts, 42 Yale L. J. 1169, 1174) suggested that *Kline* v. *Burke Construction Co.*, 260 U. S. 226, makes clear what was dark before. This court now adopts their suggestion as the law. It is unsound, as we shall demonstrate, and contrary to what this Court has uniformly said the removal cases and *Kline* v. *Burke Construction Co.* mean.

Neither the Removal Act nor *French* v. *Hay*, *Dietzsch* v. *Huidekoper*, nor *Madisonville Traction Co.* v. *Mining Co.* were mentioned in the *Kline* opinion. In fact, it was not a removal case at all. Burke Construction Company sued Kline in the federal court in Arkansas for breach of contract. Kline then sued Burke in the Arkansas state court on the same contract for an accounting and damages. To justify the injunction issued by the federal court

against the state court proceedings, Burke argued, among other things, that it had a constitutional and statutory right to sue Kline in the federal court because of diversity of citizenship and the requisite jurisdictional amount and that since the state court suit might be tried and decided before the federal court action and the judgment there pleaded as *res judicata*, the federal court proceeding would be futile, so that the subsequent state court proceedings thereby deprived Burke of that constitutional right to proceed in the federal court. Mr. Justice Sutherland held that the right to institute original proceedings in the federal court (and by implication, the right to remove proceedings from the state to the federal court) was not conferred by the Constitution but by the Act of Congress; that, however, the federal court properly had jurisdiction of Burke's suit against Kline to proceed to judgment and the state court properly had jurisdiction of Kline's suit against Burke to proceed to judgment; and that thus "there can be no question of judicial supremacy, or of superiority of individual right" (l. c. 235). Thus no removal was involved at all and no injunction was sought against further prosecution in the state court of a case validly removed. The case against the prosecution of which the injunction was sought was entirely separate, distinct and independent from the federal court case, instituted there originally by Burke. Even if it be assumed that the basis of the Kline case was that the federal court had no jurisdiction to protect by injunction *in that case*, that basis does not and cannot exist in the removal cases. By the act of removal, the state court loses jurisdiction and the federal court acquires jurisdiction (*National Steamship Co.* v. *Tugman*, 106 U. S. 118; *Madisonville Traction Co.* v. *Mining Co.*, 196 U. S. 239; *Anderson* v. *United Realty Co.*, 222 U. S. 164). If thereafter plaintiff attempts to proceed further in the state court suit, the federal court may enjoin him to protect the jurisdiction it has acquired against the unlawful exercise of the purported jurisdiction the state court has

lost. This is what *French* v. *Hay* and the other cases hold and nothing in the *Kline* case even purports to change or otherwise affect the authority of these cases.

Mr. Justice Sutherland, who wrote the opinion for this court in the *Kline* case, apparently did not regard it as clarifying, explaining, overruling or in any way affecting the principle announced in *French* v. *Hay*, *Dietzsch* v. *Huidekoper*, and *Madisonville Traction Co.* v. *Mining Co.* In *Local Loan Co.* v. *Hunt*, 292 U. S. 234, he cited *Dietzsch* v. *Huidekoper*, along with *Julian* v. *Central Trust Co.* and *Root* v. *Woolworth*, as authority for the issuance of an injunction by a federal equity court *after* a discharge in bankruptcy to prevent litigation in the state court of a claim already discharged in bankruptcy "notwithstanding the provisions of Section 265 * * *" (l. c. 239). If Mr. Justice Sutherland had thought that by the *Kline* case he was denying the validity of the reason given by the court in the *French*, *Dietzsch*, and *Madisonville Traction* cases, he certainly would not have cited the *Dietzsch* case as authority for the very proposition for which this court now says it did not stand.

In 1936 (*Dugas* v. *American Surety Co.*, 300 U. S. 414), this court, through Mr. Justice Van Devanter, cited *French* v. *Hay* and *Madisonville Traction Co.* v. *Mining Co.*, as authority for the granting of an injunction by a federal court to prevent state court litigation of a claim settled by a federal interpleader decree. The court said, l. c. 428:

> The power of the Court to enjoin Dugas from further prosecuting his suit in the state court * * * has full support * * * in settled adjudications respecting the power of a federal court to protect its jurisdiction and decrees.

Not until now has this court stated that the removal cases were bottomed upon the language of the Removal Act. We respectfully submit that they are not. Noth-

ing in *Kline* v. *Burke Construction Co.* suggests that they are. They simply represent a well recognized "exception" to Section 265 *by judicial construction* of that statute.

b. Interpleader. The Interpleader Act of 1926 is but a legislative recognition of the judicial construction of the Act of 1793, namely, that where a *res* is involved such as a fund, the federal court has the power to enjoin state court interference with it.

3. In holding that there is no established doctrine excepting "relitigation" cases from Section 265, this court has disregarded its plain rulings in prior decisions.

Root v. *Woolworth*, 150 U. S. 401, is said to be "erroneously regarded" as illustrating a "relitigation" exception because no state court suit had been brought. True, no state court suit had been begun, but Woolworth's supplemental bill alleged, among other things, that "your orator is informed and believes the said defendant threatens to, and unless restrained by the order and injunction of Your Honors will, institute divers actions in respect of the title of said premises and thereby vex, annoy and harass your orator" and the decree enjoined Root, among other things, "from bringing any action or actions touching the title to or possession of the said premises." Thus state court proceedings were included within the scope of the injunction and it is a fair interpretation of the case, in view of the regard in which it has subsequently been held by this court, to say that this court thought then that Section 265 did not forbid the injunction even if state court proceedings had been commenced. In 1933, Mr. Justice Sutherland cited the *Root* case as authority for this very proposition, in *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 239. Again in 1936 Mr. Justice Van Devanter cited it for the same proposition, in *Dugas* v. *American Surety Co.*, 300 U. S. 414, 428, 429.

Prout v. *Starr*, 188 U. S. 537, is more than the "first come, first served" case, now discredited by *Kline* v. *Burke Construction Co.*, 260 U. S. 226. It is a true "relitigation" case. Starr filed a stockholder's suit against the Rock Island and the Nebraska State Board of Transportation to enjoin the Board's enforcement of a Nebraska rate statute alleged to be unconstitutional. A restraining order was issued pursuant to the bill. At about the same time and in the same court, certain stockholders of the Burlington, the Chicago & North Western and the Union Pacific filed three similar suits for the same relief. In Starr's case the parties *agreed* that that case should abide the result of the Burlington, the Chicago & N. W. and the Union Pacific cases and that the decree in Starr's case should be conformable to those entered in the other three cases. Decrees were entered against the defendants in these cases which were affirmed by this court in 1898 (*Smyth* v. *Ames*, 169 U. S. 466). Thereafter Prout succeeded Smyth as Attorney General of Nebraska on January 1, 1901, and instituted an action in the Nebraska state court against the Rock Island to recover penalties for an alleged violation of the Nebraska statute whose enforcement had been forbidden by this court in 1898. Starr then applied by supplemental bill in the original Rock Island case for an injunction against the prosecution of Prout's suit in the state court. An injunction was issued and affirmed by this court, Mr. Justice Shiras saying, l. c. 544:

> The object of the supplemental bill was to restrain the present appellant, as successor to Smyth, from attempting to transfer the very matters that stood for judgment in the Federal court to the state court by filing a bill in the latter. Such a course might bring about a conflict between those courts, and create the confusion so often deprecated by this court. * * *
>
> The jurisdiction of the Circuit Court could not be defeated or impaired by the institution, by one of the parties, of subsequent proceedings, whether civil

or criminal, involving the same legal questions, in the state court. * * *

Julian v. *Central Trust Co.*, 193 U. S. 93; *Riverdale Mills* v. *Manufacturing Co.*, 198 U. S. 188, and *Local Loan Co.* v. *Hunt*, 292 U. S. 234, are now peremptorily dismissed as "*res*" cases and therefore inapplicable. Mr. Justice Day did not think so in *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356; he cited the *Julian* case as a "relitigation" case. See, also, *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, 292. Neither did Mr. Justice Van Daventer in *Dugas* v. *American Surety Co.*, 300 U. S. 414, 429. At the time the supplemental bills for injunction were filed in these three cases, no *res* was in the possession or custody of the court and that is not the ground on which the relief granted was based. Justification for the injunction was the necessity and justice of preserving to the winning party the fruits of its decree. Mr. Justice Reed has so ably analyzed these cases and so accurately interpreted their significance that we need not repeat it here.

We are not told why this court "need not consider" *Gunter* v. *Atlantic Coastline*, 200 U. S. 273. The case directly involved the attempted relitigation in the South Carolina state court of the issue of the railroad's exemption from state taxation established 25 years before in the federal district court for South Carolina. This court held that an injunction issued pursuant to a supplemental bill was proper.

Hale v. *Bimco Trading, Inc.*, 306 U. S. 375, is not like the *Gunter* case. The mandamus action in the Florida state court was instituted first. Thereafter Bimco, not a party to the mandamus suit, sued in the federal court in Florida to prevent the action sought to be compelled by the mandamus case. An interlocutory injunction was issued by the federal court and the Florida Supreme Court ordered that the mandamus case be stayed until this court

passed on the constitutionality of the statute in Bimco's case. This court held that the prohibition of Section 265 did not apply to forbid the injunction enjoining the enforcement of the statute. Thus this case bears no resemblance to the *Gunter* case in any material particular. It did not represent any attempt to relitigate in the state court issues previously decided by a federal decree. On the contrary, it is the kind of case typified by *Kline* v. *Burke Construction Co., supra.*

Looney v. *Eastern Texas R. R. Co.*, 247 U. S. 214, is said not to be a "relitigation" case and "obviously" not to rule this case. Admittedly, its facts are not *exactly* like those here in that the injunction there was not in aid of a final decree. But the injunction was to enforce a previous temporary injunction issued to prevent state court interference with the pending federal suit, and the justification for the injunction was the protection and preservation of the prior federal jurisdiction "until the object of the suit is accomplished and complete justice done between the parties" (l. c. 221). That was regarded as "familiar and long established practice" (l. c. 221). Thus the case is in principle exactly like this one.

The *Looney* case has been cited with approval six times by this Court in subsequent cases as authority for the proposition that Section 265 does not prohibit the issuance of an injunction against state court proceedings when necessary to protect federal jurisdiction and federal decrees from frustration, defeat or impairment through proceedings in state courts.

The first of these cases is *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175. See Respondent's original brief, page 37. The Court said, l. c. 183:

> * * * the provision [Section 265] does not prevent the federal courts * * * from maintaining and protecting their own jurisdiction, properly acquired

> and still subsisting, by enjoining attempts to frustrate, defeat or impair it through proceedings in the state courts, *French* v. *Hay*, 22 Wall. 250; *Julian* v. *Central Trust Co.*, 193 U. S. 93, 112; *Chesapeake and Ohio Ry. Co.* v. *McCabe*, 213 U. S. 207, 219; *Looney* v. *Eastern Texas R. R. Co.*, 247 U. S. 214, 221. * * * (Insert ours).

The second case is *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356, 367.

Essanay Film Co. v. *Kane*, 258 U. S. 358, follows. Kane secured an interlocutory default judgment against Essanay in the New Jersey state court without service of process on it and was proceeding to take final judgment when Essanay filed its bill in the federal court in New Jersey for an injunction to restrain further prosecution of the state court action. The injunction was denied and this court affirmed. Mr. Justice Pitney, however, said, l. c. 361:

> In exceptional instances the letter has been departed from while the spirit of the prohibition has been observed; for example, in cases holding that, in order to maintain the jurisdiction of a federal court properly invoked, and render its judgments and decrees effectual, proceedings in a state court which would defeat or impair such jurisdiction may be enjoined. *French* v. *Hay*, 22 Wall. 250; *Dietzsch* v. *Huidekoper*, 103 U. S. 494, 497; *Julian* v. *Central Trust Co.*, 193 U. S. 93, 112; *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U. S. 239, 245; *Looney* v. *Eastern Texas R. R. Co.*, 247 U. S. 214, 221. The effect of this, as will be observed, is but to enforce the same freedom from interference on the one hand, that it is the prime object of Sec. 265 to require on the other.

Continental Illinois National Bank & Trust Co. v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, follows. This court affirmed the issuance of an injunction by a federal bankruptcy court against the sale of collateral by the

Reconstruction Finance Corporation which would hinder, obstruct and delay the preparation and consummation of a reorganization plan so as probably to prevent it. This court said, l. c. 675:

> The power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is, therefore, inherent in a court of bankruptcy as it is in a duly established court of equity * * * An injunction may be issued in such circumstances where the purpose of protecting and preserving the jurisdiction of the court "until the object of the suit is accomplished and complete justice done between the parties." *Looney* v. *Eastern Texas R. R. Co.*, 247 U. S. 214, 221.

Dugas v. *American Surety Co.*, 300 U. S. 414, is the next case. See Respondent's original brief, page 29. The injunction was justified upon the broad powers of an equity court as well as by the express terms of the Interpleader Act. The *Looney* case was cited as an authority for the proposition that a federal equity court had inherent power to enjoin state court proceedings "to protect its jurisdiction and decrees" (l. c. 429).

Steelman v. *All Continent Corporation*, 301 U. S. 278, follows. See Respondent's supplemental brief, page 27. The injunction was issued to restrain the prosecution of a suit in another federal, not a state, court, but the *Looney* case was regarded as a precedent for the existence of the power to issue an injunction by a federal court "when necessary to prevent the defeat or impairment of its jurisdiction" (l. c. 289).

Supreme Tribe of Ben-Hur v. *Cauble*, 255 U. S. 356, remains—for some discussion. It cannot, of course, possibly be distinguished from this case; hence it must now be overruled. It has been cited with approval once by this court in *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, in which, in a "relitigation" case, the in-

junction was against proceedings in another federal, not a state, court. Mr. Chief Justice Taft there said, l. c. 426:

> It [the Circuit Court of Appeals] could, therefore, itself have enjoined the Toledo Company from interfering with the execution of its own decree, * * *; or it could direct the district court to do so, as it did, *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356; * * * (Insert ours).

Merely because Mr. Justice Day in the *Cauble* case decided the validity of the injunction there in one sentence upon the authority of the *Looney* case "and cases cited" (which include *Julian* v. *Central Trust Co.*, 193 U. S. 93, thereby indicating that Mr. Justice Day thought that, contrary to what this court has now said, the *Julian* case was a "relitigation" case and not a "*res*" case) is no evidence that his decision is any more "sporadic" or "ill-considered" than that of Mr. Justice Swayne in *Dial* v. *Reynolds*, 96 U. S. 340. Even if *Dial* v. *Reynolds* were a "relitigation" case, Mr. Justice Swayne merely said, in denying the propriety of the injunction: "Such an injunction, except under the Bankrupt Act, no court of the United States can grant" (l. c. 341). As authority for this conclusion, he cited *Diggs* v. *Wolcott*, 4 Cranch 179, *Peck* v. *Jenness*, 7 How. 612, and *Watson* v. *Jones*, 13 Wall. 679, none of which was a "relitigation" case.

Diggs v. *Wolcott* has been analyzed by this court in footnote 5 of its opinion. It is simply the typical "first come, first serve" case, perfectly consistent with *Kline* v. *Burke Construction Co.*, 260 U. S. 226, and not involving any federal decree or any subsequent attempt to relitigate issues decided by a decree.

Peck v. *Jenness* is exactly the same kind of a case, a federal bankruptcy court having no power to enjoin a prior attachment suit pending in the state court.

Watson v. *Jones* is a similar case. In a controversy between church members over church property in Louis-

ville, the Kentucky court had decreed that Watson and others were entitled to its possession. Thereafter Jones filed a bill in the federal court to restrain Watson from taking possession. This court denied the power of the federal court to issue this kind of an injunction.

Thus Mr. Justice Day's cases much more convincingly support his conclusion in the *Cauble* case than Mr. Justice Swayne's cases support his conclusion in the *Dial* case. If *Dial* v. *Reynolds* is a "relitigation" case, this Court is now reinstating its authority by overruling the *Cauble* case which apparently had overruled the *Dial* case.

Moreover, *Dial* v. *Reynolds* is clearly not a "supplemental bill" case. Reynolds' first suit, won by Cooper, was an *ejectment* action in the federal court. Dial's suit to enforce the rights there adjudged was an independent equity bill for foreclosure and for an injunction. It was not and could not be "supplemental" or "ancillary" because the original case was a law action, not an equity action. This distinction is important, since the "relitigation" doctrine originates in the "supplemental bill" cases.

This Court has overlooked or disregarded *Dugas* v. *American Surety Co.*, 300 U. S. 414. That case demonstrates conclusively that this Court at that time (1936) thought that all of the cases we have relied upon here were authority for the relief granted in this case. The facts of the *Dugas* case are stated in our original brief at page 29. It is unquestionably a "relitigation" case. It cannot be put aside or explained as an "interpleader" case because the express authority of the Interpleader Act was only an alternative ground of the decision. The power of the court to enjoin Dugas from proceeding in the state court was put just as squarely upon "settled adjudications respecting the power of a federal court to protect its jurisdiction and decrees" (l. c. 429). The Court said, l. c. 428:

> (5) The jurisdiction to entertain a supplemental bill is free from doubt. Such a bill may be brought

in a federal court in aid of and to effectuate its prior decree to the end either that the decree may be carried fully into execution or that it may be given fuller effect, but subject to the qualification that the relief be not of a different kind or on a different principle. Story's Equity Pleading, 9th Ed., Sec. 338; *Root* v. *Woolworth*, 150 U. S. 401, 410-412; *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 239. Such a bill is ancillary and dependent, and therefore the jurisdiction follows that of the original suit, regardless of the citizenship of the parties to the bill or the amount in controversy. *Root* v. *Woolworth*, *supra*, p. 413; *Local Loan Co.* v. *Hunt*, *supra*.

(6) The power of the Court to enjoin Dugas from further prosecuting his suit in the state court on the appeal bond has full support in Sections 2 and 3 of the Interpleader Act of 1926 before quoted, as also in settled adjudications respecting the power of a federal court to protect its jurisdiction and decrees. *French* v. *Hay*, 22 Wall. 250; *Root* v. *Woolworth*, *supra*, p. 411; *Julian* v. *Central Trust Co.*, 193 U. S. 93, 112; *Madisonville Traction Co.* v. *Saint Bernard Mining Co.*, 196 U. S. 239, 245; *Looney* v. *Eastern Texas R. Co.*, 247 U. S. 214, 221; *Wells Fargo Co.* v. *Taylor*, 254 U. S. 175, 183.

Thus the removal cases (*French* v. *Hay* and *Madisonville Traction Co.* v. *Mining Co.*) were then regarded as authority for the issuance of the injunction, and not because they held or were regarded as holding that the Removal Act of 1789 amended *pro tanto* the Act of 1793. Mr. Justice Sutherland concurred in this decision, even though he had written the opinion in *Kline* v. *Burke Construction Co.*, now said by this Court to have changed the basis of the removal cases. Thus, also, *Root* v. *Woolworth* and *Looney* v. *Eastern Texas R. Co.* were then regarded as authorities, although this Court now dismisses them (the *Root* case in a footnote) as not "relitigation" cases. And, thus, *Julian* v. *Central Trust Co.* was then regarded as an authority, although this Court now says it is a "*res*" case.

For years the District Courts and the Circuit Courts of Appeals have uniformly regarded all of these cases as establishing beyond any doubt a just and equitable exception to the literal language of Section 265 to permit the federal courts to protect and maintain the integrity of their decrees and to preserve to litigants the fruits thereof. See the cases cited in respondent's original brief, page 31 and in Note 18 of Mr. Justice Reed's opinion. This Court now says that all of these courts have been misguided by "loose talk" of this Court and by "erroneous implications" from its decisions. Presumably, this Court has until now fallen into the same error, since until 1936 at least this Court had uniformly held that these cases *had* established a settled exception to Section 265 in "relitigation" cases.

It is, of course, this Court's prerogative to declare an established principle wrong and overrule a great body of decisions announcing and applying it. We have tried to point out in our original and supplemental briefs why it should not be done here. But this Court has now said that no such principle as we contend for exists. In so declaring, this Court has overlooked or disregarded a long and uniform line of controlling cases in this Court, which cannot fairly be distinguished from this case.

It is respectfully submitted that for the foregoing reasons, this Court should grant a rehearing in this case.

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We hereby certify that the foregoing petition for rehearing is presented to this Court in good faith and not for the purpose of vexation or delay.

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Attorneys for Respondent.

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SUPREME COURT OF THE UNITED STATES.

Nos. 16 and 19.—October Term, 1941.

Samuel R. Toucey, Petitioner, 16 *vs.* New York Life Insurance Company. Phoenix Finance Corporation, Petitioner, 19 *vs.* Iowa-Wisconsin Bridge Company.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[November 17, 1941.]

Mr. Justice Frankfurter delivered the opinion of the Court.

These cases were argued in succession and are dealt with in a single opinion because the controlling question in both is the same: Does a federal court have power to stay a proceeding in a state court simply because the claim in controversy has previously been adjudicated in the federal court?

No. 16. In 1935, Toucey brought suit against the New York Life Insurance Company in a Missouri state court. He alleged that in 1924 the company issued him a life insurance policy providing for monthly disability benefits and for the waiver of premiums during disability; that he became disabled in April, 1933, and that the defendant fraudulently concealed the disability provisions from him; that the defendant unlawfully cancelled the policy for non-payment of premiums; that in September, 1935, he discovered the existence of the disability provisions; that he then applied to the company for reinstatement of the policy and for the payment of disability benefits, and that the company refused.

The suit was removed to the federal District Court for the Western District of Missouri, the plaintiff being a citizen of Missouri, the defendant a New York corporation, and the amount in controversy exceeding $3,000. All of the material allegations of the bill were denied. The district court dismissed the bill, finding that there was no fraud on the defendant's part and that the plaintiff was not disabled within the meaning of the policy. No appeal was taken.

In 1937, an action at law was brought against the insurance company in the Missouri state court by one Shay, a resident of the District of Columbia. He alleged that he was Toucey's assignee and that Toucey's disability entitled him to judgment. It does not appear that the insurance company filed an answer or any other pleading. Instead, a "supplemental bill" was filed in the Western District of Missouri, setting forth the history of the litigation between the parties, alleging that the assignment to Shay was made in order to avoid federal jurisdiction, and praying that Toucey be enjoined from bringing any suit for the purpose of readjudicating the issues settled by the federal decree and from further prosecuting the Shay suit.

A preliminary injunction was granted and affirmed by the Circuit Court of Appeals for the Eighth Circuit. 102 F. (2d) 16. The court held that Toucey's claim in the prior suit rested upon proof of his disability, and that this issue, necessarily involved in the Shay proceeding, had been conclusively determined in the insurance company's favor. Section 265 of the Judicial Code, 36 Stat. 1162, 28 U. S. C. § 379, was construed not to deprive a federal court of the power to enjoin state court proceedings where an injunction is "necessary to preserve to litigants the fruits of, or to effectuate the lawful decrees of the federal courts". Certiorari was denied, 307 U. S. 638, and the injunction was made permanent. Toucey appealed and the Circuit Court of Appeals again affirmed, 112 F. (2d) 927. In view of the importance of the questions presented, we granted certiorari. 311 U. S. 643. The decision below was affirmed by an equally divided Court, 313 U. S. 538, and the case is now before us on rehearing, 313 U. S. 596.

No. 19. The Iowa-Wisconsin Bridge Company, a Delaware corporation, in 1932 executed a deed of trust conveying all of its property, principally a bridge across the Mississippi River between Iowa and Wisconsin, to secure a $200,000 bond issue. In 1933, the trustees, an Iowa corporation and a Wisconsin citizen, filed a bill of foreclosure in the federal District Court for the Northern District of Iowa. One of the Bridge Company's stockholders intervened as a party defendant, alleging that the bonds and mortgage were fraudulent and without consideration. Upon his motion, the Phoenix Finance Corporation, a Delaware corporation which held almost 90% of the bonds, was joined as a plaintiff. The Bridge Company's answer challenged the validity of the indenture and alleged

that the bonds were issued without consideration. Phoenix denied all allegations of fraud.

The case was tried before a master, whose modified conclusions were adopted by the court. Finding that the mortgage and bonds were fraudulently issued and that almost all the bonds were without consideration, the court denied foreclosure. The Circuit Court of Appeals for the Eighth Circuit affirmed, 98 F. (2d) 416, and certiorari was denied, 305 U. S. 650.

Phoenix thereafter instituted five separate suits against the Bridge Company in the Delaware state courts, seeking recovery on various notes and contracts claimed to have constituted the consideration for the bonds. The Bridge Company thereupon filed a "supplemental bill" in the Northern District of Iowa, asserting that the issues involved in the state court suits had been made *res judicata* by the federal decree, and praying, *inter alia,* that Phoenix be enjoined from further prosecuting the state suits. (In one of the suits, the state court rejected the *res judicata* plea, *Phoenix Finance Corp.* v. *Iowa-Wisconsin Bridge Co.,* 14 Atl. (2d) 386, and an appeal is now pending in the Supreme Court of Delaware.) The district court found that Phoenix was bound by the former decree, and that the prohibition of § 265 was no bar to an injunction. The Circuit Court of Appeals affirmed, 115 F. (2d) 1, and because of the relation of the questions presented to those in No. 16, we brought the case here. 312 U. S. 670.

The courts below have thus decided that the previous federal judgments are *res judicata* in the state proceedings, and that therefore, notwithstanding the prohibitory provisions of § 265, the federal courts may use their injunctive powers to save the defendants in the state proceedings the inconvenience of pleading and proving *res judicata.*[1]

First. Section 265—"a limitation of the power of the federal courts dating almost from the beginning of our history and expressing an important congressional policy—to prevent needless friction between state and federal courts", *Oklahoma Packing Co.* v. *Gas Co.,* 309 U. S. 4, 8-9—is derived from § 5 of the Act

[1] Pleading a federal decree as *res judicata* in a state suit raises a federal question reviewable in this Court under § 237(b) of the Judicial Code, 43 Stat. 937, 28 U. S. C. § 344(b). Dupasseur v. Rochereau, 21 Wall. 130; Deposit Bank v. Frankfort, 191 U. S. 499; Virginia-Carolina Chemical Co. v. Kirven, 215 U. S. 252; Stoll v. Gottlieb, 305 U. S. 165, 167.

of March 2, 1793, 1 Stat. 335: " . . . nor shall a writ of injunction be granted [by any court of the United States] to stay proceedings in any court of a state . . . " In its present form, 36 Stat. 1162, 28 U. S. C. § 379, the provision reads as follows: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy".[2]

The history of this provision in the Judiciary Act of 1793 is not fully known. We know that on December 31, 1790, Attorney General Edmund Randolph reported to the House of Representatives on desirable changes in the Judiciary Act of 1789. Am. State Papers, Misc., vol. 1, No. 17, pp. 21-36. The most serious question raised by Randolph concerned the arduousness of the circuit duties imposed on the Supreme Court justices. But the Report also suggested a number of amendments dealing with procedural matters. A section of the proposed bill submitted by him provided that "no injunction in equity shall be granted by a district court to a judgment at law of a State court." *Id.*, p. 26. Randolph explained that this clause "will debar the district court from interfering with the judgments at law in the State courts; for if the plaintiff and defendant rely upon the State courts, as far as the judgment, they ought to continue there as they have begun. It is enough to split the same suit into one at law, and another in equity, without adding a further separation, by throwing the common law side of the question into the State courts, and the equity side into the federal courts". *Id.*, p. 34. The Report was considered by the House sitting as a Committee of the Whole, and then was referred to successive special committees for further consideration. No action was taken until after Chief Justice Jay and his associates wrote the President that their circuit-riding duties were too burdensome. American State Papers, Misc., vol. 1, No. 32, p. 51. In response to this complaint, which was transmitted to Congress, the Act of March 2, 1793, was passed, containing in § 5, *inter alia*, the prohibition against staying state court proceedings.

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[2] Formulated as a contraction of the federal courts' equity jurisdiction, the Act of 1793 "limits their general equity powers in respect to the granting of a particular form of equitable relief; that is, it prevents them from granting relief by way of injunction in the cases included within its inhibitions." Smith *v.* Apple, 264 U. S. 274, 279. See Treinies *v.* Sunshine Mining Co., 308 U. S. 66, 74.

Charles Warren in his article *Federal and State Court Interference*, 43 Harv. L. Rev. 345, 347, suggests that this provision was the direct consequence of Randolph's report. This seems doubtful, in view of the very narrow purpose of Randolph's proposal, namely, that federal courts of equity should not interfere with the enforcement of judgments at law rendered in the state courts. See Taylor and Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 Yale L. J. 1169, 1171, n. 14.

There is no record of any debates over the statute. See 3 Annals of Congress (1791-93). It has been suggested that the provision reflected the then strong feeling against the unwarranted intrusion of federal courts upon state sovereignty. *Chisholm* v. *Georgia*, 2 Dall. 419, was decided on February 18, 1793, less than two weeks before the provision was enacted into law. The significance of this proximity is doubtful. Compare Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345, 347-48 with *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, 291-92. Much more probable is the suggestion that the provision reflected the prevailing prejudices against equity jurisdiction. The *Journal of William Maclay* (1927 ed.), chronicling the proceedings of the Senate while he was one of its members (1789-1791), contains abundant evidence of a widespread hostility to chancery practice. See especially, pp. 92-94, 101-06 (debate on the bill that became Judiciary Act of 1789). Moreover, Senator Ellsworth (soon to become Chief Justice of the United States), the principal draftsman of both the 1789 and 1793 Judiciary Acts, often indicated a dislike for equity jurisdiction. See Brown, *Life of Oliver Ellsworth* (1905 ed.) 194; *Journal of William Maclay* (1927 ed.) 103-04; Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 96-100.[3]

Regardless of the various influences which shaped the enactment of § 5 of the Act of March 2, 1793, the purpose and direction underlying the provision is manifest from its terms: proceedings in the state courts should be free from interference by federal injunction. The provision expresses on its face the duty of "hands off" by

[3] The last clause of § 5 of the Act of 1793, outlawing the familiar *ex parte* injunction, affords another illustration of hostility to chancery practice: "nor shall such writ [of injunction] be granted in any case without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving for the same." 1 Stat. 335.

the federal courts in the use of the injunction to stay litigation in a state court.[4]

Second. The language of the Act of 1793 was unqualified: " . . . nor shall a writ of injunction be granted to stay proceedings in any court of a state . . ." 1 Stat. 335. In the course of one hundred and fifty years, Congress has made few withdrawals from this sweeping prohibition:

(1) *Bankruptcy proceedings.* This is the only legislative exception which has been incorporated directly into Section 265: " . . . except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy". 36 Stat. 1162. This provision, based upon § 21 of the Bankruptcy Act of 1867, 14 Stat. 526, was inserted in the Act of 1793 by the Revisers. R. S. § 720; see Proposed Draft of Revision of U. S. Statutes (1872), vol. 1, pp. 418.

(2) *Removal of actions.* The Removal Acts, ever since the Act of September 24, 1789, 1 Stat. 73, 79, have provided that whenever any party entitled to remove a suit shall file with the state court a proper petition for removal and a bond with good and sufficient surety, it shall then be the duty of the state court to accept such petition and bond "and proceed no further in the cause". Section 265 has always been deemed inapplicable to removal proceedings. *Dietzsch* v. *Huidekoper*, 103 U. S. 494; *Madisonville Traction Co.* v. *Mining Co.*, 196 U. S. 239. The true rationale of these decisions is that the Removal Acts have *pro tanto* superseded the Act of 1793. Subsequent decisions have clarified the loose ground advanced in *French* v. *Hay*, 22 Wall. 250, 253. See *Kline* v. *Burke Construction Co.*, 260 U. S. 226; Taylor and Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 Yale L. J. 1169, 1174-75; compare *Bryant* v. *Atlantic Coast Line R. Co.*, 92 F. (2d) 569, 571.

(3) *Limitation of shipowners' liability.* The Act of 1851 limiting the liability of shipowners provides that after a shipowner transfers his interest in the vessel to a trustee for the benefit of the claimants, "all claims and proceedings against the owner or owners shall

[4] Section 262 of the Judicial Code, 36 Stat. 1162, 28 U. S. C. § 377, is derived from Section 14 of the Judiciary Act of 1789, 1 Stat. 81, which provided that the "courts of the United States shall have power to issue writs of *scire facias, habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." The general powers thus given to the federal courts were obviously limited by the subsequent enactment of the specific prohibitory provisions of the Act of 1793.

cease." 9 Stat. 635, 636. Being a "subsequent statute" to the Act of 1793, this provision operates as an implied legislative amendment to it. *Providence & N. Y. SS. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 599; see Admiralty Rule 51, 254 U. S., appendix, p. 26.

(4) *Interpleader.* The Interpleader Act of 1926, 44 Stat. 416, amended the 1917 Interpleader Act, 39 Stat. 929, to provide as follows: "Notwithstanding any provision of the Judicial Code to the contrary, said [district] court shall have power to issue its process for all claimants and to issue an order of injunction against each of them, enjoining them from instituting or prosecuting any suit or proceeding in any State court or in any other Federal court . . . ." See *Dugas* v. *American Surety Co.*, 300 U. S. 414, 428; *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 74.

(5) *Frazier-Lemke Act.* The filing of a petition for relief under this Act subjects the farmer and his property, wherever located, to the "exclusive jurisdiction" of the federal court. And except with the consent of the court, specified proceedings against the farmer or his property "shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court . . . ." 47 Stat. 1473. See *Kalb* v. *Feuerstein*, 308 U. S. 433.

Third. This brings us to applications of § 265 apart from these statutory qualifications. The early decisions of this Court applied the Act of 1793 as a matter of course.[5] However, a line of cases beginning with *Hagan* v. *Lucas*, 10 Pet. 400, holds that the court, whether federal or state, which first takes possession of a *res* withdraws the property from the reach of the other. *Taylor* v.

[5] The first case arising under the provision was Diggs & Keith v. Wolcott, 4 Cranch 179 (1808), where the appellants brought an action at law on various promissory notes in a state court. While this action was still pending, the defendant filed a bill in the state chancery court for cancellation of the notes. The latter suit was removed to the federal circuit court which cancelled the notes and enjoined the further prosecution of the state action at law. The report of the proceeding in this Court states merely that "the court being of opinion that a circuit court of the United States [illegible] not jurisdiction to enjoin proceedings in a state court, reversed the decree." In his *Commentaries on American Law* (1826) vol. 1, p. 386, Chancellor Kent, stating that the decision in the case "is not to be contested", refers to it as illustrative of a situation "in which any control by the federal over the state courts, other than by means of the established appellate jurisdiction, has equally been prevented." Peck v. Jenness, 7 How. 612, 625, holding that a federal court sitting in bankruptcy could not discharge the lien of a prior attachment made under state law, was the first case which expressly relied upon the Act of 1793. In Orton v. Smith, 18 How. 263, 266, the Court held it error to enjoin a state action to establish title to certain land. "The courts of the United States have no such power over suitors in a state court."

Carryl, 20 How. 583, 597; *Freeman* v. *Howe*, 24 How. 450. See *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 235: "The rank and authority of the [federal and state] courts are equal but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist, the rule does not apply. Since that necessity does exist in actions *in rem* and does not exist in actions *in personam*, involving a question of personal liability only, the rule applies in the former but does not apply in the latter."

The Act of 1793 expresses the desire of Congress to avoid friction between the federal government and the states resulting from the intrusion of federal authority into the orderly functioning of a state's judicial process. The reciprocal doctrine of the *res* cases is but an application of the reason underlying the Act. Contest between the representatives of two distinct judicial systems over the same physical property would give rise to actual physical friction. The rule has become well settled, therefore, that Section 265 does not preclude the use of the injunction by a federal court to restrain state proceedings seeking to interfere with property in the custody of the court.[6] *Farmers Loan & Trust Co.* v. *Lake Street R. Co.*, 177 U. S. 51, 61; *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 229, 235; *Lion Bonding Co.* v. *Karatz*, 262 U. S. 77, 88-89; see Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345, 359-66. And where a state court first acquires control of the *res*, the federal courts are disabled from exercising any power over it, by injunction or otherwise. *Palmer* v. *Texas*, 212 U. S. 118.

Another group of cases is said to constitute an exception to § 265, namely, where federal courts have enjoined litigants from enforcing judgments fraudulently obtained in the state courts. *Marshall* v. *Holmes*, 141 U. S. 589; *Simon* v. *Southern Railway*, 236 U. S. 115; *Essanay Film Co.* v. *Kane*, 258 U. S. 358; *Atchison Ry. Co.* v. *Wells*, 265 U. S. 101; *Wells Fargo & Co.*

[6] The extent to which a federal court's exclusive control over the *res* may require use of the injunction to effectuate its decrees *in rem* is illustrated by Riverdale Mills v. Manufacturing Co., 198 U. S. 188, Julian v. Central Trust Co., 193 U. S. 93, and Local Loan Co. v. Hunt, 292 U. S. 234, 241. Cf. Ex parte Baldwin, 291 U. S. 610, 615.

v. *Taylor*, 254 U. S. 175. In the *Simon* case, Mr. Justice Lamar undertook to rationalize this class of cases by regarding a state court "proceeding" as completed once judgment is secured, with the result that an injunction against levying execution does not stay a judicial "proceeding". 236 U. S. at 124. But this construction of § 265 was rejected in *Hill* v. *Martin*, 296 U. S. 393, 403: "That term [proceedings] is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process. It applies to appellate as well as to original proceedings; and is independent of the doctrine of *res judicata*. It applies alike to action by the court and by its ministerial officers; applies not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective." However, the opinion cites the *Wells Fargo* and *Essanay Film* cases in a footnote dealing with "the recognized exceptions to § 265." 296 U. S. 403, n. 19. The foundation of these cases is thus very doubtful. However, we need not undertake to reexamine them here since, in any event, they do not govern the cases at bar.[7]

Fourth. We come, then, to the so-called "relitigation" cases, the first of which is *Dial* v. *Reynolds*, 96 U. S. 340. The facts of the case are simple: Cooper was indebted to Staatsman. To secure these debts he executed a mortgage deed of trust under which Dial was trustee. Asserting title in himself to the property covered by the mortgage, Reynolds brought ejectment against Cooper in the federal court. On writ of error this Court set aside a judgment in Reynolds' favor and held title to be in Cooper. *Cooper* v. *Reynolds*, 10 Wall. 308, 321. Reynolds thereafter dismissed his ejectment action in the federal court and brought a new action against Cooper in a Tennessee state court based upon the claim thus previously litigated. Dial and Staatsman, joining Cooper as a party defendant, filed suit in the federal court to foreclose the mortgage and to enjoin Reynolds from further prosecuting his action in the state court. The lower court sustained Reynolds' demurrer, and this Court affirmed. It held that the "gravamen" of the bills was an injunction to prevent Reynolds from proceeding in the state court. "Such an injunction, except under the Bankrupt Act,

[7] For similar reasons we need not here consider cases like Ex parte Young, 209 U. S. 123, and Gunter v. Atlantic Coast Line, 200 U. S. 273, with which compare Hale v. Bimco Trading Co., 306 U. S. 375, 378.

no court of the United States can grant. With this exception, it is expressly forbidden by law." 96 U. S. at 341.[8]

Looney v. *Eastern Texas R. R. Co.*, 247 U. S. 214, was not a "relitigation" case. The Texas federal district court, in a suit brought by various carriers, granted a preliminary injunction restraining the state Attorney General from proceeding to assess fines and penalties upon them for complying with an order of the Interstate Commerce Commission. The Attorney General nevertheless instituted proceedings in a state court to enjoin the carriers from complying with the Commission's order, and a supplemental bill was filed in the federal court to stay the proceedings. The district court issued the injunction, and this Court dismissed an appeal under § 266, holding that the injunction below was not based upon the unconstitutionality of the Texas state statutes, but was granted merely to protect its jurisdiction until the suit brought by the carriers was finally settled. The case obviously does not rule ours. *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356, held that a federal district court, having rendered a decree in a class suit brought in behalf of all the members of a certain class of beneficiaries in a fraternal association, may enjoin members of the class, found to be bound by the decree, from prosecuting suits in the state courts which would relitigate questions settled by such decree. The opinion of Mr. Justice Day contains no reference to either the Act of March 2, 1793, or to *Dial* v. *Reynolds*. The opinion is devoted almost entirely to a discussion of whether the former decree is *res judicata* in the state suits. Having determined this question in the affirmative, the Court disposed of the remaining—§ 265—question in one sentence, citing only one case in support of its conclusion, *Looney* v. *Eastern Texas R. R. Co.*, *supra*, which, as we have seen, was not a relitigation case.[9] 255 U. S. at 367.

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[8] The Court also held that in a foreclosure proceeding the complainant cannot join a third person who claims adversely to the mortgagor and mortgagee, and that consequently there was a misjoinder of parties. 96 U. S. at 341. These grounds for decision were, of course, alternative, and either alone was sufficient to dispose of the case. However, they were entirely separate and distinct, and there is no basis for any inference that the Court might have upheld an injunction if Reynolds had been properly joined. Nor need we consider common-law refinements in actions for ejectment, for the Court went explicitly on its duty to obey the Act of 1793.

[9] Root v. Woolworth, 150 U. S. 401, is erroneously regarded as illustrating a "relitigation" exception to § 265. The case holds merely that courts of equity have jurisdiction to "effectuate their own decrees by injunctions or writs of assistance in order to avoid the relitigation of questions once settled between the same parties". 150 U. S. at 411-12. The Court did not uphold

Fifth. We find, therefore, that apart from Congressional authorization, only one "exception" has been imbedded in § 265 by judicial construction, to wit, the *res* cases. The fact that one exception has found its way into § 265 is no justification for making another. Furthermore, the *res* exception, having its roots in the same policy from which sprang § 265, has had an uninterrupted and firmly established acceptance in the decisions. The rule of the *res* cases was unequivocally on the books when Congress reenacted the original § 5 of the Act of 1793, first by the Revised Statutes of 1874 and later by the Judicial Code in 1911.

In striking contrast are the "relitigation cases." Loose language and a sporadic, ill-considered decision cannot be held to have imbedded in our law a doctrine which so patently violates the expressed prohibition of Congress.[10] We are not dealing here with a settled course of decisions, erroneous in origin but around which substantial interests have clustered. Only a few recent and episodic utterances furnish a tenuous basis for the exception which we are now asked explicitly to sanction. Whatever justification there may be for turning past error into law when reasonable expectations would thereby be defeated, no such justification can be urged on behalf of a procedural doctrine in the distribution of judicial power between federal and state courts. It denies reality to suggest that litigants have shaped their conduct in reliance upon

a federal injunction against a state suit to relitigate a claim already settled by a previous federal decree—no such state suit had been brought. Consequently, there was no occasion to consider the applicability of § 265. The "first come, first served" rationale of cases like Prout *v.* Starr, 188 U. S. 537, was discarded in Kline *v.* Burke Construction Co., 260 U. S. 226, 235. *Cf.* Haines *v.* Carpenter, 91 U. S. 254, 257.

[10] There is no warrant for the assumption that, in the proposals for the Judicial Code of 1911, Congress had before it the "relitigation" exception as settled doctrine, and that by § 265 gave it legislative confirmation. The Report of the Special Joint Committee on Revision and Codification of the Laws of the United States annotated the Act of 1793 with citations to twenty-six decisions of this Court. Sen. Rept. No. 388, 61st Cong., 2d Sess., p. 470. Yet no reference was made to four of the five decisions of this Court prior to the Judicial Code which are supposed to justify the "relitigation" doctrine: Root *v.* Woolworth, 150 U. S. 401; Prout *v.* Starr, 188 U. S. 537; Riverdale Mills *v.* Manufacturing Co., 198 U. S. 188; Gunter *v.* Atlantic Coast Line, 200 U. S. 273. (As we have already seen, "removal" cases like French *v.* Hay, 22 Wall. 250, and Dietzsch *v.* Huidekoper, 103 U. S. 494, rest upon an entirely different footing.) None of the reports submitted to Congress contain any discussion of § 5 of the Act of 1793 and the decisions construing it. See H. Rept. No. 818, 61st Cong., 2d Sess., referring to H. Doc. No. 783, 61st Cong., 2d Sess.; Sen. Rept. No. 388, 61st Cong., 2d Sess.; Final Report of the Commission to Revise and Codify the Laws of the United States (1906), pp. 29, 244. Nor do the debates disclose any consideration of the question. See 45 Cong. Rec., pts. III and IV, and 46 Cong. Rec., pts. I-V, *passim*.

some loose talk in past decisions in the application of § 265 or, more concretely, upon erroneous implications drawn from *Looney* v. *Eastern Texas R. R. Co.*, *supra*, and *Supreme Tribe of Ben-Hur* v. *Cauble*, *supra*. Compare *Helvering* v. *Hallock*, 309 U. S. 106, 119-20.

It is indulging in the merest fiction to suggest that the doctrine which for the first time we are asked to pronounce with our eyes open and in the light of full consideration, was so obviously and firmly part of the texture of our law that Congress in effect enacted it through its silence. There is no occasion here to regard the silence of Congress as more commanding than its own plainly and unmistakably spoken words. This is not a situation where Congress has failed to act after having been requested to act or where the circumstances are such that Congress would ordinarily be expected to act. The provisions of § 265 have never been the subject of comprehensive legislative reexamination. Even the exceptions referable to legislation have been incidental features of other statutory schemes, such as the Removal and Interpleader Acts. The explicit and comprehensive policy of the Act of 1793 has been left intact. To find significance in Congressional non-action under these circumstances is to find significance where there is none.

Section 265 is not an isolated instance of withholding from the federal courts equity powers possessed by Anglo-American courts. As part of the delicate adjustments required by our federalism, Congress has rigorously controlled the "inferior courts" in their relation to the courts of the states. The unitary system of the courts of England is saved these problems.

The guiding consideration in the enforcement of the Congressional policy was expressed by Mr. Justice Campbell, for the Court, in *Taylor* v. *Carryl*, 20 How. 583, 597:

"The legislation of Congress, in organizing the judicial powers of the United States, exhibits much circumspection in avoiding occasions for placing the tribunals of the States and of the Union in any collision."

We must be scrupulous in our regard for the limits within which Congress has confined the authority of the courts of its own creation.

Reversed.

Mr. Justice DOUGLAS took no part in the consideration or decision of No. 19.

SUPREME COURT OF THE UNITED STATES.

Nos. 16 and 19.—October Term, 1941.

Samuel R. Toucey, Petitioner, 16 *vs.* New York Life Insurance Company. Phoenix Finance Corporation, Petitioner, 19 *vs.* Iowa-Wisconsin Bridge Company.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[November 17, 1941.]

Mr. Justice Reed, dissenting.

The controlling issue in both the *Toucey* and the *Phoenix Finance* cases is the power of a federal court to protect those who have obtained its decrees against an effort to force relitigation of the same causes of action in the state courts. Questions of *res judicata* seem inapposite for the conclusion. We are not concerned in either case with the effect of the decrees if and when they might be pleaded in the state actions. Since federal jurisdiction in each case depended upon diversity, their effect as a pleaded bar to recovery in the state suits would depend upon the faith and credit by law or usage given like judgments of courts of the state containing the federal district.[1] But when the preliminary question is the meaning and application of the federal decree as a basis for a conclusion as to whether or not the decree shall be enforced by further steps, it is entirely a federal question. It is immaterial from that point of view whether the federal jurisdiction was bottomed originally on diversity, or the Constitution or laws of the United States. The power to give effect to the judgments of federal courts rests with Congress.[2] It has

[1] R. S. § 905; 28 U. S. C. § 687; Hancock National Bank *v.* Farnum, 176 U. S. 640.

[2] Embry *v.* Palmer, 107 U. S. 3, 9; Atchison, T. & S. F. Ry. *v.* Sowers, 213 U. S. 55, 64.

exercised that power for general purposes by Judicial Code § 262.[3]

As originally enacted § 265 was a single line in a two page act concerning practice in the federal courts. Act of March 2, 1793, c. 22, § 5, 1 Stat. 334. The act's disconnected provisions were amendments to the statute establishing Judicial Courts of the United States. The short section in which § 265 appeared on the one hand enlarged equity powers of judges of this Court by authorizing them to issue writs of *ne exeat* and injunction, and on the other restricted the use of restraining orders without notice. Left to the four corners of the act, for lack of legislative materials, for deductions as to the purpose and intention of the enacting Congress, and faced with the absolute prohibition of its words, it might well be concluded that the intention was to bar an injunction running against the court itself as distinguished from the parties.[4] The fact that courts of equity had long exercised the power to entertain bills to carry their decrees into execution by injunction against the parties adds strength to such a supposition.[5] Such needed powers would not be lightly withdrawn.

We are not relegated to such speculations, however. This provision in one form or another has been embodied in our statute law since 1793. It was continued by the adoption of the Revised Statutes of 1878 and the Judicial Code of 1911. It and the cases interpreting it have been woven into the fabric of our law through the decades. What changes would have been made in its form to meet the needs of our expanding jurisprudence, were it not for the flexibility supplied by judicial interpretation, we can only conjecture. Certainly when the code of 1911 restated its terms, the Congress took into consideration what had by that time come to be its accepted interpretation. Granted that § 265 is not a sentence or section of a legislative scheme whose meaning is to be sought in the purpose of the entire enactment or series of enact-

[3] "The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." (R. S. § 716; Mar. 3, 1911, c. 231, § 262, 36 Stat. 1162.)

[4] Cf. Steelman v. All Continent Co., 301 U. S. 278, 290; Warren, *Federal and State Court Interference*, (1930) 43 Harv. L. Rev. 345, 372.

[5] Story, Equity Pleadings (10th Ed.) § 429; Mitford, Pleadings in Chancery (1780) p. 38; Cooper, Equity Pleading, (1809) pp. 98, 99; Booth v. Leycester, 1 Keen 579 (1837); Kershaw v. Thompson, 4 Johns. Ch. 609 (N. Y. 1820).

ments,[6] we are nevertheless led by the judicial history intervening since its passage to look beyond the literal language and give weight to those decisions which had added to its content before the reenactment in the Judicial Code. In the Senate Report of the Special Joint Committee on Revision and Codification no change in language was suggested. Yet the Committee as indicative of the then state of the law cited numerous cases which are relitigation cases and are analyzed or referred to later in this opinion.[7] We are all the more persuaded to believe that the Code of 1911 intended to accept this early legislation with its judicial gloss because of the alternative offered. This alternative is that a federal judgment entered perhaps after years of expense in money and energy and after the production of thousands of pages of evidence comes to nothing that is final. It is to be only the basis for a plea of *res judicata* which is to be examined by another court, unfamiliar with the record already made, to determine whether the issues were or were not settled by the former adjudication.[8] We, too, desire that the difficulties innate in the federal system of government may be smoothed away without a clash of sovereignties but we find no cause for alarm in affirming a court which forbids parties bound by its decree to fight the battle over on another day and field.[9] We should not in reaching for theoretical symmetry hamper the efficiency and needlessly break the continuity of our judicial methodology. A decree forbidding a defeated party from setting up any right, anywhere, based upon claims adjudged is the usual form where injunctions are appropriate for determining controversies.[10]

The courts properly are hesitant to depart from literalism in interpreting a statute.[11] Strong equities do induce departure from the ordinary course where the purpose of the Congress appears plain.[12] It is hard to conceive of a statute, new or old, which

[6] Cf. United States v. Amer. Trucking Ass'ns, 310 U. S. 534, 543.

[7] French v. Hay, 22 Wall. 250; Dietzsch v. Huidekoper, 103 U. S. 494; Julian v. Central Trust Co., 193 U. S. 112; Sharon v. Terry, 36 Fed. 337; Garner v. Second Nat. Bank, 67 Fed. 833; Central Trust Co. v. Western N. C. R. Co., 89 Fed. 24; James v. Central Trust Co., 98 Fed. 489; Chicago, R. I. & P. Ry. v. St. Joseph Union Depot Co., 92 Fed. 22; State Trust Co. v. Kansas City, P. & G. R. Co., 110 Fed. 10.

[8] Dietzsch v. Huidekoper, 103 U. S. 494, 498.

[9] Cf. Princess Lida v. Thompson, 305 U. S. 456, 466.

[10] E. g., In re Chiles, 22 Wall. 157, 166; Sharon v. Terry, 36 Fed. 337, 345.

[11] Cf. Southern Railway Co. v. Painter, No. 24 this term, decided today.

[12] United States v. Amer. Trucking Ass'ns, 310 U. S. 534; United States v. Guaranty Trust Co., 280 U. S. 478; Miller v. Nut Margarine Co., 284 U. S. 498; Allen v. Regents, 304 U. S. 439.

has a meaning totally disassociated from supporting legislation or the body of adjudications within its ambit. This statute is in a posture much more favorable for the interpretation that it authorizes injunctions against relitigation in state courts than were the statutes construed in any of the cases cited in the preceding note for the interpretation given them. In fact we conclude that its restatement in the Code of 1911 with the decisions now to be examined in existence necessitates the interpretation here advocated. Additional decisions since 1911 and the failure of Congress to repudiate this interpretation add something of substance to this argument.

There exists no divergence of view in regard to the power of federal courts to enjoin proceedings in state courts where the state action may embarrass or interfere with the federal court's prior control over a *res* which is in its possession.[13] That is an exception to § 265. Equally firmly embedded is the power, long exercised as compatible with § 265, of carrying into execution by injunction against state actions the equitable decrees which have settled rights or claims between the parties to the federal litigation. This might be said to be auxiliary to the protective jurisdiction over property in the possession of a court. Inasmuch, however, as the cases hereafter cited concern rights arising from claims already adjudicated, and since, in the cases where a *res* was at one time involved, the property was no longer in the possession of the court issuing the injunction, the theory of preventing an unseemly clash over physical possession has no basis. The principle for which the following authorities stand is that a court has the right to execute its decrees to avoid relitigation and forced reliance on *res judicata*. The proceedings, as will be made to appear later, which were supplemented by the orders prohibiting state suits here under review, fall well within the limits of this hitherto well recognized conception.

As early as 1893 this Court declared in *Root* v. *Woolworth*, 150 U. S. 401, 411, that the "jurisdiction of courts of equity to interfere and effectuate their own decrees by injunctions or writs of assistance in order to avoid the relitigation of questions once settled between the same parties, is well settled." Root, the party enjoined by the original decree, asserted rights which would require relitigation of settled issues. Accordingly he was enjoined

[13] Kline v. Burke Construction Co., 260 U. S. 226, 229.

on supplemental bill, *inter alia*, "from bringing any action or actions touching the title to or possession of the said premises . . . . " Until dissolved, that injunction forbade proceedings in state and federal courts alike. Although § 265 was not discussed, the case is cited as a convenient summary of the then law, and because it promptly became a precedent for enforcement of decrees even when the problem of § 265 was raised. The authority of this case has not been doubted until now.

Prout v. *Starr*, 188 U. S. 537, 544, forbade a state suit in violation of a federal court stipulation for a decree, treated the stipulation as a decree, and enjoined an action *in personam* in the state court for the collection of penalties under an unconstitutional statute. The state action was in violation of the original federal decree. This Court said: "The jurisdiction of the Circuit Court could not be defeated or impaired by the institution, by one of the parties, of subsequent proceedings, whether civil or criminal, involving the same legal questions, in the state court."

In 193 U. S. appeared the case of *Julian* v. *Central Trust Company*. A railroad property in North Carolina had been sold under foreclosure proceedings in the federal circuit court. The decree was that the property be sold free of all claims of parties and the judicial sale was confirmed to the Southern Railway Company. Some years later a cause of action arose which was prosecuted to judgment in a state court against the original mortgagor without notice to or claim against the purchaser, the Southern. In the face of a threat to sell the property formerly conveyed by the federal decree, the circuit court enjoined the state proceedings. This Court said, pp. 112, 114: "In such case we are of opinion that a supplemental bill may be filed in the original suit with a view to protecting the prior jurisdiction of the Federal court and to render effectual its decree. . . . In such cases where the Federal court acts in aid of its own jurisdiction and to render its decree effectual, it may, notwithstanding sec. 720, Rev. Stat., [§ 265 J. C.] restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction. . . . It is conceded that the Federal right could be set up in the state court from which the execution issued, and, if denied, the ultimate rights of the parties can be determined upon writ of error to this court. In the view we have taken of this case the Federal court

had not lost its jurisdiction to protect the purchaser at its sale upon direct proceedings such as are now before us."[14]

Riverdale Mills v. *Manufacturing Co.*, 198 U. S. 189, followed the established doctrine. The Riverdale Mills acquired property by judicial sale in the federal court. A state proceeding later was begun by parties to the federal foreclosure alleging the invalidity of the sale and seeking possession of the property. Riverdale then filed an ancillary bill in the original foreclosure suit for an injunction against prosecution of the state suit. Against the claimed protection of R. S. § 720 (§ 265 J. C.), p. 193, it was held here that a federal court may "protect the title which it has decreed as against everyone a party to the original suit and prevent that party from relitigating the questions of right which have already been determined." P. 195.

It is quite clear that the Court in both the *Julian* and the *Riverdale* cases was intent not on protecting a *res*, since that had long passed from its hands, but on avoiding relitigation by executing its decrees. This appears particularly from their reliance upon *French* v. *Hay*, 22 Wall. 250, *Dietzsch* v. *Huidekoper*, 103 U. S. 494, and *Sharon* v. *Terry*, 36 Fed. 337. In the *French* case no *res* was involved. It was a federal injunction against the enforcement of a judgment of a state court obtained in a state action after removal of a related but separate state suit. The reasoning proceeded upon the protection of federal judgments, not on the language of the removal statute. The same is true of *Dietzsch*. There a state suit on a replevin bond was enjoined by the federal court because it grew out of a failure to return property awarded in replevin in a state court after the removal of the original replevin suit to the federal court which issued the injunction. It was there said, p. 497: "A court of the United States is not prevented from enforcing its own judgments by the statute which forbids it to grant a writ of injunction to stay proceedings in a State court."

[14] The doctrine of the Julian case finds illustrations in the lower federal courts. While it is true that those courts were enforcing foreclosure, that purpose had been accomplished and the enjoined state suits sought relitigation of closed issues. James v. Central Trust Co., 98 Fed. 489 (1899), modifying Central Trust Co. v. Western N. C. R. Co., 89 Fed. 24 (1898); State Trust Co. v. Kansas City, P. & G. R. Co., 110 Fed. 10 (1901); Central Trust Co. v. Western North Carolina R. Co., 112 Fed. 471 (1901); Alton Water Co. v. Brown, 166 Fed. 840 (1908).

The Court today lays aside *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273 (1906), as inapplicable. The case in our view may be properly cited as a relitigation decision. It forcefully declares, albeit by alternative ruling, for the position here taken. A federal court had enjoined a state tax on the ground of unconstitutionality. The state was a party. Years later the state brought an action in the state court for the tax which the decree prohibited. An ancillary bill sought and obtained an injunction from the federal court. This Court said, p. 292, "Indeed, the proposition that the Eleventh Amendment, or section 720 of the Revised Statutes, control a court of the United States in administering relief, although the court was acting in a matter ancillary to a decree rendered in a cause over which it had jurisdiction, is not open for discussion. *Dietzsch* v. *Huidekoper*, 103 U. S. 494; *Prout* v. *Starr*, 188 U. S. 537; *Julian* v. *Central Trust Co.*, 193 U. S. 93, 112." It cannot fairly be said, we think, that this was not a holding that a federal court has the duty to protect its parties against relitigation. This seems quite certain when we examine the cases cited which are discussed heretofore in this opinion.

The *Terry* case cited under the *Riverdale Mills* case, *supra*, is a good illustration of the permeation of our law by the principle of protection of federal decrees by injunctions against prosecuting state suits which relitigate settled issues. In *Sharon* v. *Terry*, a federal decree had determined the fraudulent character of a marriage contract, and had enjoined all efforts to establish rights under any of its provisions. Notwithstanding this decree a party thereafter sought and obtained a judgment of the highest court of the state determining the marriage contract valid. There was no plea of *res judicata* in the state proceedings. After the entry of the state judgment, the personal representative of the winning party in the federal suit revived that proceeding and obtained a renewal of the injunction over the specific objection that R. S. § 720 (§ 265 J. C.) barred the order. 36 Fed. 337, 365.

The opinion was by Justice Field of this Court on circuit and stated: "The decree of the federal court, when revived, may be used to stay any attempted enforcement of the judgment of the state court." P. 364. It is true that the opinion shows that the circuit court was of the view that prior jurisdiction of an *in personam* cause gave the federal court authority to issue an injunction against state proceedings. P. 366. But the decision was directly on the point

of enforcement of a decree. When the case came to this Court it was affirmed without consideration of § 265 on the ground that the propriety of the revivor was the only matter for decision, 131 U. S. 40.

In the later case of *Missouri Pac. Ry. Co.* v. *Jones*, 170 Fed. 124 (1909), a federal court had decided that a state statute fixing railroad rates was unconstitutional and had entered decrees for the railroads accordingly. Thereafter a county attorney commenced a suit in the state court against the companies to restrain collection of any but the statutory rate. On supplemental bill by the railroads the federal court enjoined him from prosecuting that suit, and relitigating the rate controversy. Similarly, in *St. Louis Min. & Mill. Co.* v. *Montana Mining Co.*, 148 Fed. 450 (1906), the unsuccessful party in the federal suit was enjoined from proceeding further in the state court to relitigate matters already decided.[15] The fact that the federal proceeding was ancillary to an action to try title seems to have had no part in the decision.[16]

These cases were all handed down before the adoption of the Judicial Code in 1911. They are catalogued to show that the power of the federal courts to make their decrees effective was accepted as consonant with the general prohibition of § 265. Pomeroy taught that this was the law in 1905.[17] The rule was applied after 1911 when occasion arose. By *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356, 367, it was decided in 1921 almost without discussion that a federal court which had entered a decree as to rights in a fraternal benefit association in a class suit might enjoin by ancillary bill other members of the class from relitigating the issues in a state suit. *Looney* v. *Eastern Texas R. Co.*, 247 U. S. 214, cited as a controlling precedent, was suggested there by appellant, the Supreme Tribe of Ben-Hur, upon the very point here under discussion. *Id.*, 65 Law. Ed. 675. This Court now lays the *Looney* case aside as not being a "relitigation" case.

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15 Cf. Garner v. Second Nat. Bank, 67 Fed. 833 (1895).

16 There are instances of the recognition of the power to prevent relitigation despite R. S. § 720 though the power was not actually exercised. Chicago, R. I. & P. Ry. v. St. Joseph Union Depot Co., 92 Fed. 22, 25 (1898); Guardian Trust Co. v. Kansas City Southern Ry. Co., 146 Fed. 337, 340 (1906). Craft v. Lathrop, Fed. Cas. No. 3318 (1851), presents the converse situation of the exercise of this power without consideration of the contemporary equivalent of § 265.

17 II Pomeroy's Equitable Remedies (1905) §640, p. 1079. After discussing § 265—"Accordingly, a federal court may grant an injunction against a proceeding in a state court when necessary to render effective its own decree."

While the injunction in the *Looney* case was not in aid of a decree, it was in aid of jurisdiction taken to determine a Texas rate controversy. A temporary injunction had been entered to maintain the status quo until a review by the Interstate Commerce Commission. A temporary injunction may well be likened to a decree and entitled to the same protection against relitigation. Such was evidently this Court's view. It said, page 221: "So important is it that unseemly conflict of authority between state and federal courts should be avoided by maintaining the jurisdiction of each free from the encroachments of the other, that § 265 of the Judicial Code, Rev. Stats., § 720, Act of March 2, 1793, c. 22, 1 Stat. 334, has repeatedly been held not applicable to such an injunction."

The last case in this Court, *Local Loan Co.* v. *Hunt*, 292 U. S. 234, upheld by a unanimous court an injunction upon an ancillary bill in a bankruptcy proceeding forbidding the prosecution in a state court of a claim discharged in bankruptcy. This Court placed its decision squarely on the jurisdiction of the bankruptcy court to execute its decrees "notwithstanding the provisions of § 265 of the Judicial Code." Quite properly no mention is made of the exception in § 265 "except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." The only authorization for injunctions is in Bankruptcy Act § 11, 11 U. S. C. § 29, which provides for a stay of pending suits during adjudication in bankruptcy. This is substantially the language of § 21 of the Bankruptcy Act of 1867, 14 Stat. 526, which caused the insertion of the exception in the Revised Statutes as is shown by the cross-reference under R. S. § 720. The specific exception of § 265 was inapplicable to the Local Loan Company situation. Furthermore, this case involved a *res* only in the sense that every bankruptcy proceeding involves a *res*, i. e., the estate.

Other federal courts since the adoption of the Judicial Code have continued to enjoin relitigation of settled issues.[18]

We think it may be accurately stated that for more than half a century there has been a widely accepted rule supporting the power

[18] St. Louis-San Francisco Ry. v. McElvain, 253 Fed. 123 (1918) (validity of mortgage foreclosure); Wilson v. Alexander, 276 Fed. 875 (1921) (defeasibility of title to land); Hickey v. Johnson, 9 F. (2d) 498 (1925) (validity of deeds to Indian land); American Surety Co. of New York v. Baldwin, 2 F. Supp. 679 (1933) (liability of surety on appeal bond); Sterling v. Gredig, 5 F. Supp. 329 (1932) (validity of provisions in a will); Hesselberg v. Aetna Life Ins. Co., 102 F. (2d) 23 (1939) (validity of insurance policy).

of federal courts to prevent relitigation. There are adequate precedents directly in point and others which recognize that the rule exists and is sound. Some at one time involved a *res*. A number applied the same rule when a *res* was never in the hands of the court. Not a case nor a text book is cited to support the Court's present position. No articles in periodicals suggest the propriety or desirability of so positive a change, except a single query as to the logic of the relitigation development.[19] Though the Judicial Code received careful analysis before adoption,[20] no language was inserted to disavow the settled construction of the reenacted section. *Dial* v. *Reynolds*, 96 U. S. 340, said by the Court to be a "relitigation" case, did not involve a decree. In a federal suit to quiet title an injunction was sought to forbid a state action in ejectment. It is in line with *Kline* v. *Burke Construction Co.*, 260 U. S. 226, but not even persuasive on the question of relitigation or execution of decrees.

We turn now briefly to the original and auxiliary decrees in the two cases under consideration. In the *Toucey* case his suit in equity against the insurance company for restoration of an insurance policy and payments for benefits under it on the ground of the fraud of the company was decided against Toucey. An assignee of Toucey's in privity with him sought to relitigate the same issues in a state court. The federal court which entered the original decree enjoined on supplemental bill "retrial, reconsideration or readjudication" of the settled issues and the prosecution of the state action.[21]

In the *Iowa-Wisconsin Bridge Co.* case a decree invalidating a certain mortgage and bonds issued in consideration of claimed indebtedness after protracted litigation was entered December 1, 1936, in a mortgage foreclosure suit brought in federal court by the bondholders. This decree became final.[22] Thereafter parties to the proceedings sought to litigate, in the state courts of Delaware, the validity of certain items of the indebtedness which are alleged to form the basis for the bond issue and to have been invalidated by

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19 See Taylor and Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, (1933) 42 Yale L. J. 1169, 1176. Cf. Warren, *Federal and State Court Interference*, (1930) 43 Harv. L. Rev. 345, 378.

20 Senate Report No. 388, 61st Cong., 2d Sess., (1910), p. 2.

21 Cf. Toucey v. New York Life Ins. Co., 102 F. (2d) 16, 20; Equitable Life Assur. Soc. v. Wert, 102 F. (2d) 10.

22 98 F. (2d) 416, cert. denied, 305 U. S. 650.

the former federal decree. A supplemental and ancillary bill was filed by the Bridge Company in the original federal court suit seeking an injunction against the relitigation of the already adjudicated causes of action. The District Court granted the injunction on a finding that the causes declared upon in Delaware had been settled by the federal litigation.[23]

These summary statements show plainly, it seems to us, that the injunctions now set aside by this Court were issued within the recognized rule that federal courts may protect their decree by prohibiting relitigation without violation of § 265 as heretofore understood and interpreted. Both decrees should be affirmed.[24]

The CHIEF JUSTICE and Mr. Justice ROBERTS concur in this dissent.

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[23] See, for an understanding of the complexities of the issues already settled: Bechtel Trust Co. *v.* Iowa-Wisconsin Bridge Co., 19 F. Supp. 127; First Trust & Savings Bank *v.* Iowa-Wisconsin Bridge Co., 98 F. (2d) 416; Phoenix Finance Corp. *v.* Iowa-Wisconsin Bridge Co., 115 F. (2d) 1.

[24] It might be noted that § 265 is recognized as merely a limitation on general equity powers, Smith *v.* Apple, 264 U. S. 274, while the Norris-LaGuardia Act, 47 Stat. 70, is a denial of jurisdiction to enjoin. "no court of the United States . . . shall have jurisdiction to issue any . . . injunction in a case involving or growing out of a labor dispute, except . . . ."